

ESSENTIALS *of*
COMMERCIAL
LAW

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MOSES—THE GREAT LAWGIVER

THE
ESSENTIALS
OF
COMMERCIAL LAW

BY

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REVISED EDITION

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FOREWORD

The aim of "Essentials of Commercial Law" is to develop in the student's mind such a knowledge of commercial law as will enable him, in conducting his business or profession later, to proceed within his legal rights, conserving his own best interests without trespassing upon the rights of others.

To fulfill this aim the author has set for himself and adhered to as far as possible the following ideals:

1. The course is planned to teach the student the attitude of caution and deliberation so that he will undertake business ventures thoughtfully and with a knowledge of his legal rights.

2. The subject has been developed by the more accurate inductive method.

3. The legal principles governing all honorable commercial relations have been presented in an easy, practical language understandable by the average pupil of the high school or commercial college.

4. To crystallize the principles in the learner's mind, a carefully prepared recapitulation follows the exposition of the principles of each chapter.

5. In order that the student will associate the imparted knowledge with real life, there is provided an abstract of actual cases decided by the courts of the land.

6. The appended test questions have been made interesting. They are designed to draw the student out and to exercise and develop his power of analysis.

7. There is sufficient construction work provided to give the student a self-confidence and initiative in preparing commercial papers that will be of material advantage to him on entering a business career. Wherever possible forms are given, and many are to be written up by the student.

8. A dividing line has been drawn between the important and less important phases of commercial law, with the result that the

vitally important are fully treated, while the less important are disposed of with a brief exposition.

The author wishes to express his great appreciation of the assistance of his collaborators and also to the following for valuable information, criticism, and assistance: W. C. Anderson, Esq., author of Anderson's Law Dictionary; the West Publishing Company, for permission to make extracts from the "American Digest System," St. Paul, Minn.; O. D. Frederick, M. S., Tuley High School, Chicago; and Edward T. Taylor, Attorney at Law, Lane Technical High School, Chicago.

W. H. W.

REVISED EDITION

The province of commercial law is not to make lawyers of students but rather to build up a regard for the observance of the rights and wrongs in the relationship of man to man; to bring about a realization that the law shows no preference for classes or individuals; to create a respect for laws and to build up a desire to examine both sides of all questions of business affairs and to settle questions man to man or through arbitration.

In the revision of this text the author has kept in mind:

1. That facts for settlement fall into two groups, viz: those that must be answered at once and those that may be answered at leisure. The first is every day business law and must be answered by the business man himself and these are emphasized; the second are those that are generally referred to the professional man for solution.

2. That the foundation of business law is the common law of England and that a knowledge of this is educational, instructional and cultural. Statutes are constructed with the common law as a foundation. A knowledge of the common law furnishes the student with a reason for the statute law which is an effort on the part of the legislature to modernize the law.

3. Due consideration has been given to the principal Uniform Statute Laws that are being adopted by the several states.

4. The introduction of Application of Court Decisions to Facts is a new departure in that a set of facts is established and the legal solution is effected through the application of tested facts of a somewhat similar character in decided cases.

5. The illustration of principles is emphasized and interpreted through a set of Cases in the Appendix rather than immediately following the paragraph of the text. The reason is pedagogical.

6. In the teaching of commercial law great stress should be placed on those legal questions which must be answered as business

is transacted, also the distinguishing of those that may be answered at leisure or referred to the professional man.

The author wishes to express appreciation for valuable suggestions and assistance from Mr. Charles H. Langer, Educational Director, Walton School of Commerce, Chicago, and Mr. James W. Moody of the Carl Schurz High School of Chicago.

W. H. W.

PLAN OF THE WORK

The following is a brief outline of the text, giving the teacher an idea of the author's plan of development, after twenty-five years as a teacher of the subject in commercial and high schools and seven years as a teacher of common law in Chicago law schools.

1. TOPICAL OUTLINE.
2. DEVELOPMENT OF THE PRINCIPLES.
3. QUESTIONS.
4. APPLICATION OF COURT DECISIONS TO FACTS.
5. HYPOTHETICAL QUESTIONS.
6. CONSTRUCTION WORK.
7. SEARCH QUESTIONS (STATE LAWS).
8. DECISIONS BY THE COURT (APPENDIX).
9. MOOT COURT CASES.
10. GLOSSARY.

1. The topical outlines given at the beginning of each chapter are to enable the instructor to follow the general development of the chapter without paying any attention to the text matter. This outline could be used as a blackboard outline if desired.

There is a certain continuity in each chapter that should be followed by the teacher from the beginning to the end, together with such illustrations as he may deem desirable. Then a study of a few selected cases should clinch the idea and enable the student to begin that differentiation of facts and conditions that is so important in all departments of law. No legal education is quite so liable to erroneous conclusions as that built on a knowledge of cases where the student has not mastered the legal principles that underlie and that should enable him to differentiate between the facts of several cases that are applicable in whole or in part to the facts under consideration.

2. The development of the principles of law is in logical order, and a sequence in presentation is pursued in each chapter. Whenever it is thought necessary or desirable, illustrations are used.

3. The sets of questions are given that the student may form an idea of the method used in determining the character of the text.

4. The Application of Court Decisions to Facts is the use of court decisions in determining the law as applied to a set of facts. The business man is being constantly confronted by different sets of facts and conditions. These facts and conditions require solution. Through a series of questions based on decided cases the solution is secured.

5. The hypothetical problems present sets of facts as they exist—to which the student may apply legal principles in arriving at a conclusion. They also afford ample field for discussion.

6. The construction work given should be made use of to the fullest extent. The study of commercial law produces greater benefit to the student by developing his ability to fill out properly the papers used in the business world than in training him to answer abstruse legal questions.

7. The search questions are to direct the student's attention to the laws of the particular state in which he lives. For example: The corporation is recognized by the general government and each of the forty-eight states as an association of individuals for the purpose of conducting business. Yet no two of the several state governments have exactly the same laws for the organization and maintenance of such a business association. Therefore it becomes necessary to study the legal details in the particular state in which the student lives. But to study the statutes of his state alone in reference to corporations, would give him but a meager and hazy idea of a corporation. As a matter of fact, the state law is but the legal machinery to put the corporation engine in running order. The student must study the common law to get a knowledge of the general mechanism of corporations.

State laws are in reality rules and regulations for the conduct of the affairs of mankind rather than the laying down, development, or determination of a legal principle; and these rules and regulations are being constantly changed, yet the common law principles of several centuries' standing are practically unchanged.

The state laws or state statutes are not necessarily built on principles of the common law or conditions long established, but on what the people conceive to be the proper solution of economic

or other conditions that exist to-day, and therefore require special attention. A knowledge of the statutes of a state does not constitute a legal education. It is a source of information in which social, economic, or political rights of to-day are readjusted to the legal principles of long established recognition. The next legislature may change the whole procedure.

The principles underlying the common law are woven into the entire fabric of human progress and may not be denied, but are susceptible to restriction and change in their course by statutory enactment and even by judicial interpretation.

8. The lists of decisions by the courts contain very carefully selected cases stating the application of the law. A case is the result of a trial. In any given case certain facts are alleged to exist on one side and certain other facts or contra ones on the other side. The greater weight of evidence establishes the facts of the case; the law is applied to these facts, and the decision arrived at. When duly entered of record, it constitutes the judgment of the court.

9. The Moot Court Cases are carefully selected sets of facts for the purpose of enabling the class to simulate a court room procedure in the discussion of facts and the application of law as stated and determined in law books and decisions of our courts. The object is not only the cultivation of the presentation of a set of facts, but the emphasis of and the realization of the fact that there are two sides to a question. Students are designated for the plaintiff and for the defendant. A jury is selected and the case is tried before the teacher as a judge. It is an opportunity to dramatize and personify a set of facts as the business man sees them.

10. The glossary containing the definition of legal terms is given for reference purposes. The student should have at hand a good law dictionary as well as a recognized unabridged dictionary.

Short Course. If the time allotted is short and the teacher desires to emphasize certain phases of commercial law rather than to hurry through a longer course, the following topics are suggested as offering a practical course: *contracts, agency, partnership, sales, corporations, and negotiable paper*, emphasizing the first and the last.

Uniform Statute Laws. Owing to the fact that there are over

fifty courts of final jurisdiction in this country, it is apparent that divergence of opinion and therefore conflicting decisions will be found throughout the country. These declarations are based on the common law as modified by statutes somewhat different in the several states. The National Conference of Commissioners on Uniform State Laws, in order to remedy this evil and bring about desirable uniformity in statute laws, has from time to time prepared and proposed uniform statutes for adoption by the several state legislatures.

So far as is consistent, this text complies with these laws and occasionally reference is made to them by initials as the Uniform Negotiable Instrument Act (U. N. I. A.); Uniform Sales Act (U. S. A.).

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The history of the world is but
the biographies of great men.
—*Carlyle.*

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ESSENTIALS OF COMMERCIAL LAW

CHAPTER I

INTRODUCTION—LAWS

1. DEFINITION

2. KINDS OF LAW

1. Natural Law
2. Moral Law
3. International Law
4. Municipal Law
5. Common Law
6. Statute Law
7. Commercial Law

3. IMPORTANCE OF COMMERCIAL LAW

4. ENFORCEMENT

5. QUESTIONS ON TEXT

1. Definition. A law is a rule of action. It is a rule of action or conduct, laid down by those having authority, for the guidance of all within its jurisdiction. It usually prescribes a penalty for disobedience. "It should be kept in mind that the greatest good to the greatest number is the object of the law." The letter of the law and the forms of the law concern every man and woman at almost every important step in life.

The Legislative Department of the Government makes rules or laws for the people of the United States. Each State Legislature does the same for its particular state, so also the County Commissioners and the Board of Aldermen are given limited law-making powers. Among savages the chief makes the laws. In civilized communities the head of the family does likewise.

The scope over which the law has force is bounded by the territory over which the law-making body has control or jurisdiction. Thus the laws of New York do not affect the people of California, or *vice versa*, unless the people of one state visit the other.

The necessity for law is self-evident. It is our assurance that the strong shall not trample on the weak; that the rich and powerful shall not deprive the poor of their rights without just compensation. If all men were honest, and born with a disposition to "do unto others as they would that others should do unto them," there would be little need of laws and lawyers, but mankind is ever apt to be selfish and aggressive and to strive selfishly to obtain what is not right; consequently, laws are formed for the protection of him who otherwise would be at the mercy of those more powerful than himself. Law is protective. It consists of a code of principles based upon right and justice, the fundamentals of which are the Ten Commandments. It says to the thief, "You shall not steal and profit thereby"; to the murderer, "You shall not kill and escape unpunished"; to the robber, "You shall not have the property of another without giving value for value."

2. Kinds of Law. 1. *Natural Law.* The rules of human action as prescribed by the Creator and as revealed and discoverable by the light of reason, constitute natural law. Among others are three general precepts: That we should live honestly, should hurt nobody, and should render to everyone his due. The primitive laws of nature may be reduced to *six*, namely: (1) comparative sagacity, or reason, which enables a properly constituted human being to distinguish good from evil; (2) self-love, which includes self-preservation; (3) the rights of husband and wife; (4) the tenderness of parents toward their children; (5) the religious sentiment; and (6) sociability, the feeling upon which the existence of society depends.

2. *Moral Law.* The rules and laws of divinity, prescribed and laid down regarding moral conduct, the law of moral precepts of the Mosaic Code, as distinguished from the ceremonial and civil features of that code, constitute the moral law. Example:—The Ten Commandments.

3. *International Law.* The law which regulates the conduct and mutual intercourse of independent states is called international law. It is largely determined and established by treaties and by principles and doctrines of long and recognized standing. International laws and treaties are enforced by the moral and conscientious respect held for treaties by the countries interested. War may be the consequence of the violation of the terms of the treaty.

4. *Municipal Law.* Municipal law comprises the laws of a particular state or country, the rules of civil conduct, laid down by the supreme authority, commanding what is right and prohibiting what is wrong. Examples:—Abolition of days of grace in some states; granting married women equal rights with men in holding and transferring property. Municipal laws change and modify other municipal laws or they change the common law. These laws are interpreted by the courts and enforced by the executive of the municipality or state issuing them.

5. *Common Law.* The common law is a collection of rules and customs, handed down from former generations, that have been finally adopted and incorporated into the general law of the country as best suited to the needs of its people. It originated in the early history of England, and has received additions from time to time from the decisions of great judges relating to the common affairs of life. It is sometimes called the unwritten law. Common law is constantly being formed by customs and usage.

6. *Statute Law.* The statute law is the written will of the people, or the acts of a legislature, expressed in the proper form. It constitutes the law of the government, state, county, city, or town passing same. Examples:—Acts passed by Congress, by any State Legislature, by any Board of Aldermen, by County Commissioners.

7. *Commercial Law, or the Law Merchant.* The body of commercial usages or rules recognized by civilized nations as relating to the rights of persons engaged in trade, is said to be “the system of law which the Courts of England and the United States apply to mercantile contracts. It is a branch of the Common Law, inferior in importance to no other, and in many respects quite distinct from any other. The principal objects embraced within

it are the law of shipping (which includes the law of marine insurance), the law of negotiable bills of exchange and promissory notes, and the law of sales."

3. Importance of Commercial Law. The importance of Commercial Law can hardly be overestimated from the standpoint of a business or a professional man who daily is brought in contact with the transaction of business. No man can be expected to know all the law, although the legal maxim, "Ignorance of the law excuses no one," applies to all. Mr. Justice Story says: "As every man is presumed to know the law and to act upon the rights which it confers, when he knows the facts it is a culpable negligence in him to do an act, or make a contract, and then set up his ignorance as a defense." A business man must know the law or suffer the consequences. He should know his legal rights that he may protect himself fully, and also that he may escape the consequence of doing what he has no right to do under the mistaken idea that he is transacting business in a proper and legal manner.

4. Enforcement. Parties in business relationship will at times get into disputes and will accordingly be unable to settle their differences themselves. Formerly men were permitted, and in fact directed, to fight out their differences in personal combat. More civilized man has evolved a more sane and just method. Disputants may call in a third party and have him act as an *arbitrator*, the parties agreeing to abide by his decision. At times this method will not satisfy one or the other of the parties and will fail, as the usual arbitrator lacks power to enforce his findings. Consequently we have established *courts* of law to perform this duty and have given them power to enforce their *decisions*.

Stripped of legal phraseology, a trial is conducted about as follows: The facts in a disputed *case* are that Mr. Brown, a merchant, and Mr. Sumner, a contractor, have had dealings over a considerable time, made up of purchases, sales, work performed, and money payments. The balance due is in dispute, evidenced by the following conversation: Mr. Brown says, "I paid the balance of my account on November 2." Mr. Sumner replies, "Yes,

you paid me money on that date, but it did not settle the account in full. You still owe me two hundred dollars." "Why, Mr. Sumner, you know that I said that this payment settles our account in full." "You said nothing of the kind, Mr. Brown." Mr. Sumner rejoins, "Well, if you do not pay me within five days I will enter suit." Mr. Brown replies, "Go ahead and sue. You will see how far you get with your suit."

It is very evident to the student that this question cannot be settled by the parties interested. Each man is positive that he is right and that the other is wrong. A sensible thing for these men to do would have been for them to check over their "accounts" and see if one or the other had made a mistake. No, they are going to indulge in the luxury of a lawsuit. Even the winning of a lawsuit is not always profitable or wise. Oftentimes the avoidance is more profitable. Irving says, "I lost one-half of my property in a suit that I lost, and later lost the other one-half in a suit that I won."

In order to get the dispute before a court, it will be necessary for each party to secure the services of an attorney. Probably a retaining fee, part payment in advance, will be necessary, as attorneys must be paid. This case should not take more than a forenoon or afternoon session of a court to try it, perhaps less.

The difficulty is explained by each party to his attorney. Mr. Sumner's attorney will prepare a statement of the facts claiming a certain amount due in proper form and file it with the court that has the right to try such a case. The paper is known as a *declaration* or a *complaint*. Mr. Brown will be served with a notice from the court which is known as a *summons*.

Mr. Brown takes the notice of his summons to his attorney who makes out a written statement known as a *reply*. (Some states call this an answer.) In this case he will deny that there is any balance due to Mr. Sumner. The issue is now ready for trial. The Court sets a day for hearing and places the call of the case as of a certain day on his calendar. On the day in question the interested parties are present. The judge enters and prepares for the business of the day.

Judge: "Mr. Clerk, call the next case on the calendar."

Clerk: "Sumner *vs.* Brown."

Judge: "Are the interested parties present?"

Response: "Yes, your honor," replies each attorney.

Judge: "Is a jury wanted?"

Attorneys: "Yes, your honor."

Judge: "Mr. Bailiff, bring in a jury."

NOTE. In large cities where there are several courts trying similar cases, a venire is served on a number of men who are tested and sworn as jurors. They are called on for jury cases as needed. If no jury is present, one is formed. A jury for civil cases like the one in question is quickly formed. If either party objects to a member of the jury another one is brought in or the entire membership may be secured from those who make up the venire. The jury selected takes its place and is sworn.

Judge: "Mr. Clerk, swear the witnesses."

NOTE. The plaintiff, the defendant and witnesses are sworn to tell the truth. In some jurisdictions the witness is sworn as he takes the stand.

Judge: "The plaintiff will state his case."

Attorney for Mr. Sumner makes a brief statement of the case. The attorney for the defense follows and briefly states the facts as he understands them.

Attorney for Plaintiff: "Mr. Sumner, take the witness stand."

Atty.: "What is your name and business?"

Mr. S.: "James Sumner, contractor at 125 Pine Street."

Atty.: "Do you know Mr. Brown, the defendant in this case?"

Mr. S.: "Yes."

Atty.: "Mr. Sumner, please tell the court and jury just what business transactions you have had with Mr. Brown."

Mr. S.: Mr. Sumner recites the business, item by item, showing the charges and credit by pointing out the various items in the various books of record, namely, sales book, day book, journal, and cash book. The ledger is used as an index to locate the different items and their source—also receipted bills and cancelled checks are offered. These are all offered in evidence and are known as "Exhibit A."

NOTE. Probably several questions and answers would be made use of to bring out the facts exhibited on the books of records and various papers introduced. The records show a balance due Mr. S., of \$200.00.

Atty.: "The defense may take the witness."

Atty. for Defense: "Mr. Sumner, did you make the records in the various books, and make out the bills and checks that are here in evidence?"

Mr. S.: "No, sir. My bookkeeper did all that for me. I signed the checks."

Atty.: "That's all, Mr. Witness."

The witness steps down from the chair.

Atty. for Plaintiff: "Miss Willing will take the stand."

Atty.: "What is your name and business?"

Miss W.: "Lillian Willing, bookkeeper for Mr. Sumner."

Atty.: "Mr. Sumner, the plaintiff in this case?"

Miss W.: "Yes, sir."

Atty.: "Well, tell the judge and jury all of the dealings that Mr. Sumner had with Mr. Brown, so far as your records go."

Miss W.: Miss Willing traces all the items to their source in the original books, identifies all the papers introduced, such as letters, bills, checks, and so on. This checking up shows a balance due Mr. Sumner of \$200.00.

Atty.: "The defense may have the witness."

Atty. for the Defense: "Miss Willing, did you make all the records in these various exhibits?"

Showing her the various books of accounts and papers and so on.

Miss Willing: "Yes, sir."

Atty.: "What happened to this cash book record on the 10th?"

Showing her a place where an erasure had been made.

Miss W.: "Well, I made a mistake and had to change the amount, so I erased the first one."

Atty.: "Oh! So you make mistakes now and then, do you? What about this item, and here's another changed amount. Are all of these erasures caused by mistakes?"

Miss W.: "I don't know that I make more mistakes than others do."

Atty.: "Your honor, we object to the answer, it is not responsive to the question."

Judge: "The witness will answer the question."

Miss W.: "I don't know the question now."

Judge: "The reporter will read the question."

Reporter reads the question.

Miss W.: "Yes, but I don't see what that has to do with it, all people make mistakes."

Atty.: "Your honor, we object to the reply of the witness except the word 'yes.' We ask that the rest of the reply be stricken from the records."

Judge: "Objection sustained. The witness will confine her replies to the questions hereafter."

Atty.: "When did you find that the item was wrong and had to be changed?"

Miss W.: "About a week later I couldn't prove my cash with the bank account and so changed the item."

Atty.: "Well, how did you happen to decide it was this item that should be changed?"

Miss W.: "Mr. Sumner said it belonged on the other side of the cash book."

Atty.: "Now, Miss Willing, if the item, the one of \$100.00, had been left on the cash book as you originally had it, how would Mr. Brown's account stand?"

Atty. for Defense: "Your honor, we object to that question. It calls for a conclusion."

Judge: "Objection sustained."

Atty.: "That will do for the witness."

Atty. for Plaintiff: "That finishes our case."

Judge: "Has this defendant any evidence to offer?"

Atty. for Defense: "We see very little reason for presenting evidence, but we will call two witnesses. Mr. Brown, please take the witness stand. What is your name, business, and location?"

Mr. Brown: "Wm. J. Brown, merchant at 215 Green Street of this city."

Atty.: "Are you defendant in this case?"

Mr. Brown: "Yes, sir."

Atty.: "Will you state what business relations you have had with Mr. Sumner, introducing such books and papers as are necessary?"

Mr. Brown recites the business transactions that he has had with Mr. Sumner, introducing and identifying all papers and books which are offered in evidence and are marked "Exhibit B."

Atty.: "Plaintiff may take the witness."

Atty. for Plaintiff: "Did you make the records introduced?"

Pointing to the various records, etc., in "Exhibit B."

Mr. Brown: "No, sir."

Atty.: "That's all."

Atty. for D.: "Mr. Harrison will take the stand."

Atty. for D.: "What is your name and business?"

Mr. Harrison: "Allen P. Harrison, bookkeeper for Mr. Wm. J. Brown, merchant."

Atty.: "Is Mr. Brown the defendant in this case?"

Mr. Harrison: "Yes, sir."

Atty.: "Did you make all the records, etc., in these books and records?"
Showing him the papers and books introduced by Mr. Brown.

Mr. Harrison: "Yes, sir. I did."

NOTE. This account is gone over with the witness and the fact brought out that the account balances.

Atty.: "The plaintiff may take the witness."

Atty. for P.: "We have no questions to ask."

Atty. for D.: "That concludes our case."

Judge: "The attorneys for the plaintiff and defense will confine themselves to brief closing remarks. Will twenty minutes each be sufficient, gentlemen?"

Response. Both attorneys: "Yes, your honor."

Atty. for P.: Makes a closing statement which is a summing up of the evidence offered showing a balance as stated. He is handicapped by the evidence given by the bookkeeper. The records should hardly make a favorable impression on the jury.

Atty. for D.: In his closing remarks, brings out the neatness and accuracy of the bookkeeper for the defense and the inaccuracy on the part of the records for the plaintiff. Each attorney cites cases in support of his claim.

Judge.: Gives a summing up of the case giving the substance of the law applicable and directs the jury to retire and deliberate on the question. The jury goes to the jury room. No one else is admitted. A foreman is selected from the group. A vote is taken on the questions involved. When an agree-

ment is reached, the bailiff who is at the door is informed. He informs the judge who directs that the jury be brought in.

Judge: "Is the jury ready to report?"

Foreman: "Yes, your honor; we find for the defendant."

This ends the trial. Various motions may be made at this time or later asking for a new trial, judgment to be set aside, and so on.

Unless this case is appealed within a certain time the case is finished, and the parties are bound by the finding. Had the jury brought in a verdict of say, \$100.00 for one of the parties, the verdict would be satisfied by the payment of this sum. If the party so directed refuses to pay, the court may cause to be issued an order known as an *execution* which directs the bailiff to seize certain property belonging to the defeated party for sale for the satisfaction of the judgment.

5. QUESTIONS ON TEXT

What is law? What is its object? What is the source of our laws? What is the territorial boundary of a law? Why is law necessary?

Name the different kinds of law. What is natural law? Moral law? International law? Common law? Statute law? Give example of each.

What is commercial law? What are some of the subjects to which it relates? Why is a knowledge of commercial law important? Explain the legal maxim "Ignorance of the law excuses no one." Why should not ignorance of a law excuse a wrongdoer?

How are municipal and state laws enforced?

How is international law enforced?

What is law enforcement? How are questions settled by arbitration?

CHAPTER II

PROPERTY

6. PROPERTY

7. DEVELOPMENT

1. Personal Property
2. Real Property
3. Mixed Property

8. CHANGES

9. OWNERSHIP

1. Kinds of Ownership
2. Limitations Placed Upon Ownership

10. QUESTIONS ON TEXT

6. Property. Property, in a general sense, is what one owns to the exclusion of others. The artist takes a canvas of little value, paints and oils, and by the strokes of genius produces a masterpiece. This picture that he has created is property. It is his exclusively. *He has the right to do with it what he chooses so long as he does not interfere with the rights of others.* It has value because it will satisfy the desire of others, it will be sought by them. The early settler pre-empts or takes up a claim of government lands. He acquires an exclusive right to this property. It is his to do with as he chooses. It is a thing of value—he may sell or exchange or use it for any of the purposes for which land is ordinarily used. Property, therefore, includes everything that may be owned; it is an exclusive right to a transferable thing of value. Property, in an abstract sense, means ownership, title, estate, right; in a concrete sense, it means the thing owned.

7. Development. The first laws enacted, or handed down, were rules for the suppression of violence and the settling of

quarrels. In its progress and development the community soon recognized the right of the individual to certain property, things necessary to sustaining and protecting life, such as the rude implements of agriculture and those used in the chase and in warfare. Lastly, it recognized the right of the individual to the use and occupancy of a portion of the land. Two classes of property came to be recognized, personal property and real property.

1. *Personal Property.* Personal property includes all property that may readily accompany the person and is easily moved from place to place. Examples of personal property are stocks, bonds, notes, moneys, horses, cattle, furniture, implements, etc.

2. *Real Property.* Real property includes all property that is of a fixed nature, generally defined as immovable; as, land, including all that is firmly attached thereto, not only the surface with the growing timber and buildings thereon, but mineral deposits beneath. Land, in contemplation of law, extends from the center of the earth upward indefinitely to the sky.

3. *Mixed Property.* Mixed property includes such property as in its nature partakes of the characteristics of both personal and real; as, leasehold interests.

8. **Changes.** Through the agency of man property is frequently changed back and forth from one class to the other. Thus, growing timber is classed as real; if cut down and manufactured into lumber, it is classed as personal; but if the lumber is used in constructing fences or buildings, it again becomes real property. Many such examples exist.

9. **Ownership.** It frequently happens in the affairs of business that both the title and the possession of a chattel are not in the same person. If the title and possession are together, it illustrates a thing, or *chose*, in possession. If the title is in one person and the possession with another, the person having title is said to have a chose in action; that is, he may have an action or suit at law to recover his property or the value thereof. A chose in possession consists in title to and possession of personal property in the same person. A chose in action is a thing of which one has the title but not the possession. In a large sense, a chose in

action may be considered not only as a right to recover possession, but a right to damages, whether growing out of the commission of a *tort*, an omission of a duty, or a breach of contract. A sells a horse to B and takes B's note for the purchase price. The note is a chose in action. An action at law may be necessary to recover the value.

1. *Kinds of Ownership.* When the ownership rests in one person he is said to be the sole owner, but the ownership may be in several persons. If all have an equal share and the titles are the same, the estate is that of joint tenancy, and under the old common law the right of survivorship applies; that is, the interest of one at his death passes to the remaining joint owners, rather than to his heirs or representatives. If the tenants merely hold the same possession, but the interests are not equal, or arise from different sources of title, it is tenancy in common. Upon the death of a tenant in common his interest descends to his heirs or representatives.

2. *Limitations Placed Upon Ownership.* While a person may own property to the exclusion of all others, there are yet certain limitations that will now be considered.

First. The owner is not at liberty to use his property in such a way as to injure another. This is an application of the Golden Rule.

Second. The state or government reserves the right to take a part of a person's property for the support of the state and for the improvement of public institutions. This is so that the state may carry on many activities and secure many benefits for the community that could not be secured by the actions of the individual, such as schools, parks, libraries, provide police and fire departments, all for our joint benefit and protection. This is the right of *taxation*.

Third. The state has the right to control the use of property under certain limitations and in some cases to take the property even to the extent of destroying it. This is known as *police power*. For example, a dangerous disease spreads among the cattle of a state. It is known as the hoof and mouth disease. The state authorities send their veterinarians to the afflicted district. Under the orders and directions of these officers the

affected animals are destroyed and buried. As a rule, the state advances a reasonable amount of pay to the owners of the animals destroyed.

Fourth. A person's property is liable to be taken by direction of the court for the payment of his debts. His just debts must be paid—he cannot give away his property and thereby defraud his creditors. However, one who makes a *bona fide* purchase will be protected in his title to the goods, or land, as the case may be.

Fifth. Sovereignty implies the power to order and direct for the best interests of the community. Therefore, the state has power to dispossess a person of the ownership of property and convert it to the use of the public. When property is so taken the state is bound to pay to the owner a fair compensation. This is exercising the "*right of eminent domain*."

10. QUESTIONS ON TEXT

What is property? Give examples. How many elements are necessary? Name them.

Trace the development of property rights. Name the classes of property. Define personal property; real property; mixed property. Give several examples of each. Give illustrations of property changing from one class to the other.

Name the classes of personal property. What is the basis for this classification? Give several examples of each. Give several examples of choses in action and then illustrate the separation of these. Name the kinds of ownership. Define each. What is the right of survivorship?

Has one an absolute or a relative ownership in his property? Explain the limitations of one's ownership. Point out a difference between the police power of a state and its power of eminent domain. What is the Golden Rule?



EMPEROR JUSTINIAN (483-565)

Emperor of the East; celebrated lawgiver. The most valuable gift of Rome to the world was its system of jurisprudence; Rome's greatest product, her lawyers and jurists. When Justinian came to the throne in 527, ambitious "to restore the grandeur of the Empire," the statutes and decisions constituting the legal system of Rome, laws and rulings which had been developed during a period of over a thousand years, had become greatly confused. Accordingly, he appointed Tribonian, a celebrated lawyer, to revise and codify the laws. He compiled the *Code* of twelve books of statutes, and the *Digest* of fifty books of decisions of learned lawyers. Later the *Institutes* were written. This text is to-day used by students of the civil law. It is the basis of the modern laws of Europe.

Bryce says of the *Institutes*, "Being studied by all the educated men, the poets, the philosophers, the administrators of the Middle Ages, it worked itself into the thoughts of Christendom, losing the traces of its origin as it became the common property of the world."

CHAPTER III

READING LESSON IN BUSINESS LAW

I

II. INDUCTIVE STATEMENT

11. Inductive Statement. Man is a social being. He lives in groups. Rules and regulations are therefore necessary to keep the transgressor from getting what does not belong to him, and to determine how we shall share with others the results of our joint efforts. Two fundamental principles are recognized and have been for many centuries: viz., ownership of property and the right of contract. First, we may say this belongs to you and this to a family. You may do with your things, property, anything that you desire, provided you do not injure some one else through your use. Second, you have a right to have others do what they agree to do, and others have a right to have your promise to them carried out. You get some groceries from the corner store. You say nothing about paying for them, yet you should pay for what you have received. You work for a man for a week. Should you receive anything for your services? Yes, because the merchant received something of value from you. These questions are legal questions and the business man must meet many such each day; the aim should be to solve them on the basis of the "Golden Rule."

Mr. Allen says to Mr. Cullen, "I will sell you my auto for \$2000.00." Mr. Cullen replies, "Agreed." The result is a contract and the law says its terms are to be carried out; that is, Mr. Cullen must pay the money called for to Mr. Allen and Mr. Allen must let Mr. Cullen have the auto.

Again, Mr. Allen says to Mr. Dennis, "Will you take dinner with me this evening at the club?" Mr. Dennis says, "I shall be pleased to do so." Mr. Dennis should keep his agreement, but he did not make a contract.

Again, Mr. Allen says to Mr. Ernst, "I will sell you my horse

King for \$500.00." Mr. Ernst replies, "I want the horse, but have not the ready money." Mr. Allen says, "Well, you may have until 2 o'clock tomorrow afternoon to make up your mind." Mr. Ernst replies, "All right." Mr. Ernst starts to raise the money and borrows it on his note from his banker. He reports to Mr. Allen at one o'clock on the day in question and says, "Here is your money for King." Mr. Allen replies, "Why! I sold the horse to Mr. Franklyn yesterday." Mr. Ernst is offended and says, "I'll sue you for damages for breaking your agreement." Mr. Allen says, "I am sorry but I can do nothing." Mr. Ernst reports to his lawyer, Mr. Brown, and says, "I want you to sue Mr. Allen for damages for breaking his contract." "All right," says the lawyer, "let me hear your case." Mr. Ernst relates the circumstances. The lawyer, after hearing the story, says, "Sorry, Mr. Ernst, but you have no case against Mr. Allen; you should have paid Mr. Allen a consideration, a small sum of money or anything of value for the keeping of the promise good until the stated time. This would have formed a contract to keep the offer open until the stated time, and then you would have been entitled to damages for breach of contract, but as it is you can do nothing."

"You see on analyzing your relationship with Mr. Allen," observes the lawyer, "we find yourself and Mr. Allen the parties; the offer and acceptance the agreement; the agreeing to keep the offer open until 2 o'clock, the subject matter; but there is no consideration, therefore no contract, and the law says you have not been damaged, as you have risked nothing. You have parted with nothing of value, therefore you have not lost anything."

Mr. Ernst thanks his lawyer and is about to leave when the lawyer says, "Mr. Ernst, my fee is ten dollars." Mr. Ernst pays the bill and departs with his first lesson in business law.

II

Mr. Ernst's business included during the month many questions of business law. Several contracts were made, and he is sure that all was transacted in a proper manner. However, one of the contracts necessitates the services of Mr. Brown, his attorney. A summary of this contract he entered into is as follows:

Mr. Ernst of Atlanta, on October 6th, writes to Mr. Gano of New York that he will sell him 50 bales of cotton at 24 cents a pound, deliverable F. O. B. Atlanta any time within the next twenty days. This offer will be delivered to Mr. Gano in New York on October 8th.

On October 7th the price of cotton advances and Mr. Ernst writes and mails a letter to Mr. Gano withdrawing his offer of the 6th. This letter should reach Mr. Gano on the 9th. Mr. Gano receives the offer on the 8th and immediately accepts and mails this letter to Mr. Ernst. This letter is lost in the mails and, of course, never delivered.

Mr. Ernst, acting on his withdrawal, sells all his cotton to Mr. Hunter at the advanced price. On October 15th Mr. Ernst receives a wire from Mr. Gano directing him to ship the cotton to Charleston. Mr. Ernst answers this wire by a letter stating, "I withdrew my offer of the 6th on the 7th, and that, therefore, any acceptance after the 7th would not be binding. At any rate no acceptance was ever received, so again there is no contract. Also, I have sold out my holdings in cotton."

Mr. Gano is somewhat incensed on receiving this communication from Mr. Ernst. He had arranged shipping facilities from Charleston and made a contract for the disposal of the cotton with a manufacturing firm at Lowell, Mass.

All the facts are as stated and may be established by competent evidence, i. e., the mailing of letters, dates, etc. Mr. Gano instructs his attorney, Mr. Ives, to inform Mr. Ernst that a claim is to be entered against him for damages through breach of contract.

Mr. Ernst calls on his attorney, Mr. Brown, directing him to take care of the case, as he does not propose to pay any damages to Mr. Gano as he has no contract with him. Mr. Brown, the attorney, is agreeable, but says, "Now give me a full history of this case from beginning to end." Mr. Brown questions Mr. Ernst very carefully as to dates, use of the mail, and the character of the offer, and finally says, "Of course, Mr. Ernst, I'll take your case, but the best thing to do is to settle this case out of court as you have no ground for defense. Mr. Gano had a perfectly good contract with you and you broke it." The attorney continues, "First, you made Mr. Gano an offer adopting the mail as your agent to

carry this offer to him. Your withdrawal on the 7th inst. accomplished nothing until it was delivered. In the meantime your offer was accepted by Mr. Gano before the letter of withdrawal became effective. By implication you made the mail service your agent and Mr. Gano handed his reply to your agent. This acceptance became binding as soon as the letter was mailed. That the letter was lost was not Mr. Gano's fault. You made a definite contract with Mr. Gano and broke it. You are liable in damages." Further, the attorney says, "The damages in this case would be the difference between the market price of the cotton at the time the contract was made, stated in the offer, and the market price, probable, on the 15th when you failed to deliver the goods. Apparently, this is 5 cents a pound, approximately \$1250.00."

Mr. Brown, the attorney, says, "I will see Mr. Gano's representative and effect a compromise if possible." To this Mr. Ernst agrees, as he now reasons that he is in the wrong and says, "Go ahead."

Later, the firms' representatives are brought together and Mr. Gano agrees to settle for \$750.00 which Mr. Ernst pays through his attorney to Mr. Gano's attorney.

After Mr. Gano's representative has departed, Mr. Ernst says to Mr. Brown, "Well, what is your bill?" The reply is, "One hundred dollars." Thus ends the second lesson in commercial law.

III

Mr. Ernst calls on Mr. Brown his attorney and says: "Mr. Brown, I want some legal advice relative to the conducting of business so as not to be involved in damages and claims." Further he says, "I have already paid you for your services several hundred dollars. In each of the last two cases it occurs to me that I should have known enough law to keep out of trouble. However, it is evident that I did not. Now, Mr. Brown, how much and what business law should I know? I cannot afford to have a lawyer at my elbow all the time." "Well," replies Mr. Brown, "your request is some contract, but I believe we can arrive at a safe conclusion."

"First, you should take a course in business law covering such

subjects as contracts, agency, partnership, corporations, notes and bills, and perhaps one or two other subjects.

"Second, you should know how to make the ordinary business contract. A few are required to be in writing. You should know how to make and handle all the ordinary kinds of commercial paper; something also about the other subjects named in this text, but most of them are simply sub-divisions of contracts.

"Third, you should know how to make all the ordinary contracts because you cannot have a lawyer with you to give you advice. If you are not sure of your ground, consult your lawyer, but many of the contracts of this class will not wait for deliberation and consultation.

"Fourth, this includes a class of contracts that require mature and deliberate consideration before they are completed, such as drawing articles of co-partnership, articles for incorporation, and the purchase of real estate. For these, consult your lawyer and keep out of trouble. However, in the case of the purchase of real estate you may have to act quickly or the sale is picked up by your opponent. You should know that an agreement to sell land or an interest therein may be completed by a penciled memorandum of sale signed by the party to be charged and then your lawyer may complete the deal.

"Now, Mr. Ernst, the field of law is a broad one. You as a business man must know a certain amount of day-to-day business law. Let the lawyer attend to the intricate and professional questions.

"If I might make a comparison, and in all comparisons one must be cautious, you should know the simple laws of health without transgressing on the province of the physician. You should know the ordinary rules of sanitation without entering the field of engineering. Likewise, you must know the rules of business law and in this you will not transgress the province of the professional man, the lawyer."

"Well," says Mr. Ernst, "I begin to see my way without any difficulty. What surprises me is that my high school work did not include some instruction in so important a subject as business law. I was filled with information relative to health and sanita-

tion which I see is a valuable personal asset, but why not the same consideration for my property interests?"

"I'll have to leave your query, Mr. Ernst, to the educators. I am not a philosopher, but a plain, practical, professional man."

"Mr. Brown, I shall pay the fee for this talk with a great deal of enthusiasm and profit."

"No! There will be no fee, Mr. Ernst. I have enjoyed this talk and I shall be satisfied with your regular work that naturally goes to the professional man."

IV

A few days later, Mr. Ernst calls on Mr. Brown and says, "Mr. Brown, our new firm desires to employ an attorney to handle all of our legal business. The salary we are able to offer you is five thousand dollars a year. This will not necessitate your giving up your present practice." Mr. Brown replies, "Well, Mr. Ernst, this is indeed a pleasant surprise and I shall carefully consider your offer." "Suppose," says Mr. Ernst, "I call on you tomorrow and get your answer, Mr. Brown." "All right, that will be agreeable, Mr. Ernst."

On the following day, Mr. Ernst calls and Mr. Brown says, "I have decided to accept your offer of yesterday and shall be pleased to call on your directors and enter into a written agreement. I want to thank you for your interest in making this offer to me."

"That is all right, Mr. Brown. You have always treated me squarely and I want to return the favor. Now I have a personal favor to ask. I have been put in charge of credits and contracts for our new firm and want you more fully to outline my course of business law."

"All right, Mr. Ernst. I see that you have a copy of 'The Essentials of Commercial Law' with you. Suppose we divide the book up into sections and you can report from time to time and I will test your knowledge of the subject." "That will be fine," says Mr. Ernst.

Mr. Brown, after having looked over the text, says, "You will notice the first part is designated contracts. The contract is the

basis of business law. Unless your knowledge of contracts is good, you cannot expect to become well acquainted with the following subjects. Contracts to the following subjects in business law is like a trunk of a tree to its branches. Business law, as we understand it, is based on the right of the individual to *own property* and the *right of contract*. We believe in allowing the individual to say 'This is my property.' Then we must protect him in his rights; we must also enforce a contract, as when A says to B, 'I will sell you my auto for \$1500,' and B replies, 'All right, I'll take it.' Here we have an illustration of an individual owning a thing and his desire and his right to sell it to another person; likewise the rights of this other person in the contract.

"You will see that Chapter IV is introductory. In reality it is merely the explaining of a few legal terms or tools that you may use in solving the following chapters. Chapters V, VI, VII, and VIII, constitute the fundamentals of a business contract; parties, subject matter, consideration and agreement. These four elements are closely related. In fact, these four elements must be present in every deal, or there is no contract.

"Chapter IX, The Operation of the Contract. Briefly its relationship to others. Chapter X, The Interpretation of the Contract. Briefly how we look to its parts, find its meaning. Chapter XI, The Discharge of the Contract. Briefly how we dissolve, or get out of a contract or finish it. Chapter XII is a very important lesson. Briefly how to preserve and protect your rights. The several chapters following are mostly review and constructive work. This latter assignment covers the operation end of contracts and you should find it very interesting. It is the product end of the law of contracts which is always more interesting than the fundamentals of the subject. It is more like laboratory work where you have your facts and are trying them out.

"In addition, let me give you a little advice; now, when you have an agreement or contract or what purports to be a contract to solve, answer it by using common sense. Look at both sides of the question and try to give each party a square deal. Also there is the great outside world that may be interested in how you deal with it. Apply the Golden Rule and you cannot be far wrong.

“Mr. Ernst, let me suggest the following in getting a lesson: (1) Read the chapter to get the viewpoint. Try to see the field as a whole. (2) Read the second time for the high points, mile posts as we might call them. If an illustration is given, read the principle and illustration as one. When instead a ‘case’ reference is given, do not at once use the reference, but see if you can get the meaning of the principle without an illustration. Then read the case reference. A ‘case’ is a decision by a court on certain facts that are presented to the court for the application of legal principles. You are warned against using a decided case to settle all sets of facts that to you seem similar. No two cases are exactly alike. It takes a trained lawyer to pick out of a decision the ruling applicable to the set of facts he is trying to solve. (3) Read the questions and try to answer them without referring to the text.

“Report back to me when you have mastered the chapters that I have outlined for you and I will test you out.”

“Mr. Brown, I am going ‘over the top’ with this work, as the boys said in France. Good day.”

CHAPTER IV

FORMATION OF CONTRACTS

12. INTRODUCTION

13. CONTRACTS

1. What the Subject Includes
2. Definition
3. Elements of a Contract

14. DIVISION OF CONTRACTS ACCORDING TO FORM

1. Specialty
2. Parol
 - (a) Written Parol Contracts
 - (b) Oral Parol Contracts
 - (c) Express Contracts
 - (d) Implied Contracts

15. FREQUENCY OF IMPLICATION

16. TIME OF PERFORMANCE

1. Executed Contracts
2. Executory Contracts

17. VALIDITY OF CONTRACTS

1. Valid
2. Void
3. Voidable
4. Unenforceable

18. QUESTIONS ON TEXT

19. ILLUSTRATIVE QUESTIONS

12. Introduction. A buys from B, his grocer, a sack of beans. Must A pay for the beans? How much? A says the beans are wormy and refuses to pay. B says they were not, but got wormy since he sold them. Must A pay? A plants some of the beans

and they do not grow. A wants B to refund and also pay for the loss of the use of the land. B says "No. I did not know you wanted to plant them." Can A recover his money? A great many questions may develop from the relationship of two persons in a business transaction. The purpose of this introduction is to acquaint the student with the make-up of questions of a legal character that he should be prepared to answer or to warn him that he needs the advice of the professional man, namely, a lawyer.

13. Contracts. 1. *What the Subject Includes.* Contracts in a broad and comprehensive view include by far the greater part of all law that relates to the affairs of man, except the law of court procedure and the law of crimes. The merchant hires a clerk; this transaction is a contract. The farmer sells his cattle; this also constitutes a contract. If two men agree to carry on a certain business, the agreement is a contract and is called a partnership. The banker gives his note; it is a contract. You buy a newspaper on your way to the office; it is a contract. The state grants a railway company a right of way, called a franchise; it is a contract. In fact, the smallest enterprise as well as the greatest undertaking is subject to the law of contracts.

2. *Definition.* A contract, then, is an agreement made for a legal consideration between competent parties to do or not to do a particular thing.

3. *Elements of a Contract:*

- (1) The parties.
- (2) The subject matter. (Thing to be done or not to be done.)
- (3) The consideration. (Generally money.)
- (4) The agreement— $\left\{ \begin{array}{l} \text{Offer} \\ \text{Acceptance} \\ \text{Time} \end{array} \right\}$ (Meeting of minds.)

These elements are the essentials that together make up the whole contract; each contract must have them.

Example. A offers to sell to B 1000 bushels of wheat at 50c. per bushel, and B accepts the offer. (1) A and B constitute the parties. (2) The transfer of the title to, or ownership in, the wheat is the subject matter. (3) The money, \$500.00, is the consideration. (4) A's offer and B's acceptance constitute the agreement.

Name the elements in the following instances:

1. A, a clerk, offers to work for B, a merchant, for one month for \$50, to which B agrees.
2. The C. M. & St. P. R. R. offers to transport grain for you at the rate of \$75.00 per car. You accept, engaging three cars.
3. You pay the landlord \$25.00 for the rent of an apartment for one month.
4. B shovels the snow from C's sidewalk for 25c.; payment is made.
5. D pays tuition of \$75.00 in the University of Chicago.
6. You get on a street car and pay your fare of five cents.
7. C leaves his horse with B one month, B charging him \$5.00 for feed and stable rent.

14. Division of Contracts According to Form.

SPECIALTY—always written.

PAROL— $\left\{ \begin{array}{l} \text{Written, always express.} \\ \text{Oral } \left\{ \begin{array}{l} \text{Express.} \\ \text{Implied.} \end{array} \right. \end{array} \right.$

1. *Specialty Contract* (often called a deed). A specialty contract is a written contract that is signed, sealed and delivered.

Explanation. The seal is a relic of barbaric times when war was the only occupation of honor. In those days the kings and lords were, as a rule, unable to read and write; consequently, when it became necessary for them to affix their names to any instrument, they did so by means of a stamp, called a seal. By statute it is now customary to write the word "Seal" after the name and enclose it in a scroll, as, F. S. McDaniel (Seal).

2. *Parol Contract.* A parol contract is a contract not under seal. The great majority of contracts are of this character and may be written or oral, express or implied.

(a) *Written Parol Contracts.* A written contract is one in which all the terms are fully agreed to and reduced to writing and which is signed by the parties and delivered, each party usually, but not necessarily, receiving a copy. The writing is said to be the repository of the intention of the parties and is the best evidence of that intention.

(b) *Oral Parol Contracts.* An oral contract is one in which the parties come to an agreement by word of mouth, but the agreement is not evidenced by a written memorandum. An oral con-

tract, in the absence of statute to the contrary, is as binding and as strong as a written contract, but is not so easily proved.

(c) *Express Contracts.* An express contract is one in which all the terms are understood and agreed to by the parties before it is completed. It may be either oral or written. An express contract, if legal, will be enforced by the courts. It is the complete evidence of what the parties have agreed to.

(d) *Implied Contracts.* An implied contract is one in which some of the terms or elements are left unmentioned at the time the agreement is made and entered into. Unless one of the parties to such an agreement has performed what he has agreed to do, the courts will not enforce the agreement, both because neither party has parted with anything of value, and also because courts are not established for the purpose of making agreements, but for the purpose of protecting in their rights those who have made agreements. If the agreement has been completed on one side, the law contemplates that a contract has been made, and therefore enforces it by supplying the lacking element. There can be no implied contract where there is an express contract covering the same subject matter.

Illustration. A ordered of a cabinetmaker a desk, which was to be made of a certain kind of wood and delivered at his office. The cabinetmaker agreed to do this. The element of consideration is lacking. If the cabinetmaker finally refuses to make and deliver the desk, A cannot sue him, as they did not have a complete contract. If, however, the desk is made and delivered according to agreement, A will have to pay for it, although he did not in express terms agree to pay anything; and he will have to pay what the desk is worth in the market. The law supplies the lacking term. In this we see the protective character of the law. As in this case, it is generally the consideration that is the lacking element in an implied contract.

If a person takes goods from a store with the knowledge of the merchant, there is an implied contract to pay for them.

Name the lacking elements in the following examples:

A offers to work for a merchant for one month, the work to commence to-morrow. The merchant accepts the offer.

B on his way to the office leaves an order with the butcher, and the order is filled.

A cord of wood is placed in B's yard. B sees a workman commence to change the cord wood into stove wood, but does not interfere

You continue to take a newspaper from the postoffice after expiration of subscription.

15. Frequency of Implication. In the affairs of the business world the implied contract is frequently met with. In the hurry of business some term or element is left to be settled later, according to the rules of law. It is not advisable for the man of affairs to enter into more of these contracts than is necessary, as they frequently lead to litigation.

Furthermore, where a person engages to do a certain piece of work for a certain compensation, he impliedly contracts to exercise reasonable skill and care and to perform the undertaking in a workmanlike manner.

16. Time of Performance. As to time of performance there may be two forms of contract:

1. *Executed Contracts.* An executed contract is one fully completed, with nothing remaining to be done by either party. In reality, an executed contract is merely the history of what was agreed to by the parties and what has been done.

2. *Executory Contracts.* An executory contract is an agreement entered into by two or more parties for the purpose of establishing contractual rights which are to be carried out at some later period. When the terms have been complied with, it becomes an executed contract.

17. Validity of Contracts. 1. *Valid.* A valid or binding contract is one in which are found all of the contractual elements as enumerated at the beginning of this chapter.

2. *Void.* A void contract, on the other hand, is one that is destitute of legal effect. It is not in reality a contract. It is not susceptible of legal affirmation, and third parties cannot acquire bona fide rights under it for value.

3. *Voidable.* A voidable contract is one that may be affirmed or rejected at option by one of the parties. In such an agreement, the party may overlook the defect and ratify the contract in spite of the flaw, or he may disaffirm because of it. But he may lose his right to reject it by taking benefit under it, or by the fact that

innocent third parties have acquired rights therein. This cannot occur if the contract is void. If the innocent party desires to repudiate the contract because of fraud he must do so within a reasonable time after learning of the fraud, otherwise he is said to waive his right to reject or deny the contract.

If A is defrauded in a contract with B, the contract is voidable. But A must renounce the contract as soon as he learns of the fraud. The law does not countenance slothfulness; lapse of time is held to be a waiver of one's right to annul a contract.

Examples: White sells goods to Black, being led to think that Black is Brown. The contract is void on the ground of mistake and Black acquires no right to the goods.

A sells goods to B, being led by the fraud of B to think that the market is falling. B resells to M, an innocent purchaser, for value. M acquires a good title to the goods and A is left to his remedy against B for the fraud. This contract was voidable so long as B held the goods.

4. *Unenforceable.* An unenforceable contract, while incapable of being set aside at the option of one of the parties, is one which has obstacles to its enforcement, not affecting its existence as a contract, but only setting difficulties in the way of action being brought or proof given.

Examples of such contracts are those that fail to comply with the Statute of Frauds, and so cannot be proved; those which have fallen under the Statute of Limitations, and can be revived only by an acknowledgment in writing or by part payment being made. (See pages 47 and 80.)

18. QUESTIONS ON TEXT

What is a contract? What does the subject of contracts include? Name the elements of a contract. How are contracts divided according to form?

Define a specialty contract. Give examples.

Define a parol contract. Give examples. What is the difference between a parol and a specialty contract?

Define a written contract. Define an oral contract. How do you prove a written contract? How do you prove an oral contract?

What is an express contract? Give examples.

What is an implied contract? Give examples.

As to time of performance how are contracts classed? Define each and give examples.

Define the following as applied to contracts: void, voidable, unenforceable.

Give examples illustrating each. What is the difference between a void and a voidable contract? Compare a void contract with one that is unenforceable.

19. ILLUSTRATIVE QUESTIONS

1. Mr. A induced B, who had a contract to sing at a place of amusement for C, to engage at another place. Was A liable in damages? Why?

2. D contracted to bore a well for E but through lack of skill and negligence made a failure of the work. D asks pay for the time he was employed. Discuss E's liability.

3. F worked for G as a clerk for one month on trial. The work was not very satisfactory and G discharged F and refused to pay for the work performed. Discuss liability.

4. H offers a fine horse, a pet, for sale to I for \$500. I says nothing, but J pays the money to H and takes away the horse. H later objects to this and offers to return the money and demands the return of the horse. Discuss rights.

CHAPTER V

THE FIRST ELEMENT—THE PARTIES

20. INTRODUCTION

1. Definition
2. Duties on Third Parties
3. General Rule
4. Restrictions

21. COMPETENCY

1. Age
2. Mind

22. INCOMPETENCY

1. Minors—Exceptions
 - (a) Ratification
2. Married Women
3. Aliens
4. Insane Persons
5. Idiots
6. Drunken Persons

23. TORTS

24. LIABILITY

1. Individual
2. Joint
3. Joint and Several

25. QUESTIONS ON TEXT

26. ILLUSTRATIVE QUESTIONS

20. Introduction. Let us next consider in detail in this and the following chapters the four elements of the contract. Since one cannot sue himself or engage in an undertaking with himself that may be enforced by law, it is self-evident that there must be at least two parties to every contract.

1. *Definition.* The parties to a contract are those affected by the obligation, and this includes all who are affected in any way by its provisions and who claim gains or may suffer loss.

2. *May Impose Duties on Third Parties.* While as a general rule third parties cannot acquire rights under a contract entered into by others, yet they may become subject to duties and liabilities if they are brought in contact with either party. Where, as was said, one induces another to break a contract, he is liable for damages.

3. *General Rule.* All persons whom the law considers competent are allowed to make contracts. The main requisites are that they be of legal age and have a sound mind.

4. *Restrictions.* From the standpoint of public policy the law shields certain persons from the ill effects of contracts they may make, and denies to others the right of entering into contracts. Still, in the former instance, all persons are in law presumed to have the capacity to contract, and he who would claim exemption from the contractual liability because of incapacity must prove its existence.

21. Competency. 1. *Age.* In order to make a binding contract the party must be of age, generally twenty-one years for males and females. Some states, by statute, however, permit females to contract at eighteen.

2. *Mind.* The mind must be of sufficient acuteness to discern the meaning of the undertaking, as the law contemplates a "meeting of minds."

22. Incompetency. Incompetency is divided into two classes, legal and natural. Minors, married women, and alien enemies are legally incompetent; profligates, drunkards, lunatics, and idiots are naturally incompetent.

1. *Minors.* A minor or infant is a person under the age of legal majority. From the standpoint of public policy, contracts relating to business which are made by a minor are declared voidable; that is, he has the privilege of abiding by his agreements or of declaring them to be of no force. This right is his to protect him against agreements that he might make with those who would

attempt to take advantage of his youth. The right is not given that he may defraud. If a minor makes a contract and then refuses to perform it, he must, if possible, return the benefit received. If, for instance, he buys a horse and gives a note in payment, he may refuse to pay when the note falls due, but he must return the horse. If, however, he has sold the horse and used the money, he cannot be compelled to return any value to the holder of the note.

This disaffirmance of a contract may be made during minority only when it relates to personal property. But a disaffirmance in a conveyance of land cannot be made before majority. The minor may accept the rents and profits during minority and still disaffirm later. No particular form of disaffirmance is necessary. Any act inconsistent with ownership or with the existence of the contract and showing an intention not to be bound, is sufficient. The disaffirmance must be complete—he cannot disaffirm part and retain part. Disaffirmance renders the contract void from the beginning the same as if there had been no contract. “The rule seems to be that where an infant acquires an interest in permanent property to which obligations attach, or enters into a contract which involves continuing rights, duties, benefits, and liability, and has taken benefits under the contract, he will be bound unless he expressly disclaims the contract. On the other hand, a promise to perform some isolated act, or a contract wholly executory, will not be binding upon the minor unless he expressly ratifies it upon coming of age.”

The minor may always enforce a contract against an adult; he may not, however, enforce against the adult and reject his own part of the contract to be performed. The right to disaffirm is personal to the infant, and he alone can take advantage of it during his life and sanity. Upon his death, or if he becomes insane, his contracts may be avoided by his heirs, personal representative, conservator, or guardian.

Exceptions. Contracts made by minors for board, clothing, instruction and medical attendance, which are classed as necessities, are valid and enforceable to the extent of the reasonable value of the articles furnished or the services rendered. What are necessities is a question of fact and will depend upon circumstances, taking into consideration the station in life of the infant.

What would be called necessities in one case might in another case be called luxuries.

These articles must not be for ornament or pleasure merely, but for use; and the quantity must be reasonable. If the infant lives at home and is supported by his parents, he is not liable for necessities. The things furnished him must concern his person and not his estate. Persons dealing with an infant do so at their peril, and the burden is upon them to show that the actual circumstances were such that the things furnished were necessities. If a minor agrees to pay \$25 for a suit of clothes that is worth but \$15, he cannot be compelled to pay more than their value, his agreement to the contrary notwithstanding.

While a minor is not bound for what may be termed business contracts, he may, nevertheless, on attaining his majority, ratify such contracts made during his minority. His liability then becomes complete and binding from the beginning—but it must be as to the *whole* contract, it cannot be in part.

(a) *Ratification* may be brought about in several ways. If, upon arriving at majority, the minor makes an absolute promise to live up to an agreement formerly made, he is bound; no new consideration is necessary; he simply waives a right. Secondly, a mere acknowledgment is not sufficient. If the promise is conditional, the condition must be performed before liability accrues. This ratification must be made knowing that there is no liability. Some states require a written acknowledgment and promise to perform. Ratification of agreements may result from acts; as where the contract was continuous and the minor continues to receive the benefits of the agreement after he reached his majority. After ratification has been made the contract is binding, and suit may be maintained upon it. Before this the minor would in effect say in court, "I was under age when I made the agreement and do not wish to be held liable." (See Case No. 1.)

NOTE. This reference is found in the Appendix.

2. *Married Women.* The common law regarded the rights of a married woman as merged in those of her husband; therefore, she had no contractual rights. The common law has been so greatly changed and modified of late that in most states a married woman's rights are similar, or equal, to those generally defined as pertaining to parties in general.

3. *Aliens*. An alien is a person who owes his allegiance to a foreign country. While the respective countries are on terms of friendship and peace, all contracts that are allowed in general are binding between aliens and citizens; but in some jurisdictions aliens either cannot acquire and hold land, or are permitted to acquire and hold it only for a limited time. In case of war they are called alien enemies, and all contracts made during the continuance of the hostilities are void; the contracting parties would even be liable to punishment. If an alien enemy is sued upon a contract entered into during peace, he may defend the suit. Contracts that were made prior to the declaration of war are merely suspended during the hostilities. The reason for this standing of contracts with aliens is two-fold: first, to prevent a citizen from becoming antagonistic to his country through eagerness for trade, and secondly, to prevent the withdrawal of a country's resources that doubtless would be an aid to the enemy.

4. *Insane Persons*. A contract made by an insane person or one who is *non compos mentis*, is as a rule void. The following contracts, however, are valid and binding: (1) Contracts created by law. (2) Contracts for necessities furnished the insane person, his wife, or his children. (3) In many states, where the sane party acts in good faith without any knowledge of the other's insanity, and the contract is so far carried out that he cannot be placed in his former position, the contract will be valid. In most states, however, contracts by a person who has been judicially declared insane and placed under guardianship, are declared to be absolutely void. (See Case No. 2.)

A person is *non compos mentis* in a given instance when, by reason of idiocy, lunacy, monomania or any other defect of the mind, he is at the time of entering into the transaction in question incapable of understanding its nature and effect. The voidable contract of an insane person may be ratified or avoided by himself when sane, by his guardian during the time his ward is insane, or by his heirs or personal representatives after his death. The right to disaffirm is personal, and a third person cannot avoid the contract.

The law makes the very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of

mature age and sound mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain which the infant may void; it holds the sane to the obligations from which the insane may be loosed. It intends that he who deals with infants or insane persons shall do so at his peril.

5. *Idiots.* Idiocy is a deficiency in the proper conception of things. The distinction between insanity and idiocy is, in one case, *loss* of intellect, and, in the other, *lack* of intellect, generally from birth. A contract formed with an idiot is always voidable, and in many cases absolutely void. The general rule, however, relating to necessities of life is recognized.

6. *Drunken Persons.* A contract entered into by a person so drunk as to be incapable of understanding its nature and effect is voidable at his option, except that he is liable on contracts created by law, and for necessities. The rules of ratification and disaffirmance are here substantially the same as in the case of infants and insane persons, but the incapacity must be that the intoxicated person is incapable of exercising his understanding.

23. Torts. A tort is a breach of a legal duty or the injury of another's rights for which the injured party may claim damages. A tort may arise from contractual relationship as where a passenger is injured while riding on a train. He may maintain an action in tort for the damages. The passenger had a contract with the company, but the injury is not the result of a breach of contract. The injury was the result of lack of proper care, therefore a tort. There are in general two elements that enter into a tort, (1) a wrongful act or omission, and (2) an injury or loss resulting from the wrongful act.

Persons enjoying protection of the law, such as minors, insane persons, drunken persons, aliens, convicts, are liable in damages for torts. An exception is made in the case of very young infants. Many torts arise from the interference of contractual relations resulting in damages, such as deceit, false representations, conspiracy, conversion, and malicious interference with contracts. Other torts are semi-criminal in character, such as trespass, assault and battery, malicious prosecution, and nuisance.

24. Liability. While all contractual agreements result in benefits and liabilities, the latter are variously classed as follows:

1. *Individual.* This is the liability of a single person in any contract or agreement; as, A agrees to pay or to sell or to work. These illustrate individual liability on the part of A.

2. *Joint.* In this the liability is divided between several. If A, B and C together promise or pledge, each one is liable in proportion to the number promising, but only for his part, in this case one-third.

3. *Joint and Several.* This is the result of an obligation assumed by several; not only are the parties liable as in the second case, but each one is also individually liable for the whole liability. If, however, one performs the whole, he may call on the others for their share. Owing to the difficulty in effectually enforcing joint obligations, many states have enacted laws to the effect that all joint liabilities shall be joint and several.

25. QUESTIONS ON TEXT

Define parties. What relations may third parties sustain to a contract? Who are competent to contract? What are the grounds of incompetency?

What is a minor, and when may he make a valid contract? When may the voidable contract of a minor become valid? What rights has a minor against an adult with whom he has contracted?

Distinguish between rights relating to personal and real property. What are necessities?

Distinguish between the rights of a married woman under the common law and at the present time.

What powers to contract have aliens? Insane persons? Idiots? Drunken persons?

Define individual liability. Joint liability. Joint and several liability.

26. ILLUSTRATIVE QUESTIONS

1. A, a minor, trades a pony to B, an adult, for a hunting dog and the exchange is made. Later, A objects to the contract and demands the return of the pony. A still has the dog. Discuss the rights of the parties.

2. C, a minor, sells an expensive fishing outfit to D, an adult, for \$150.00. The exchange is made and C spends the money in needless expense. Later he demands the return of the fishing outfit. Discuss the rights of the parties.

3. E, while temporarily insane, sells a piece of property to F for a sufficient amount, to be paid in installments. Later he recovers from his insanity and receives several payments as they fall due. Finally he decides to cancel the contract on the ground that he was insane when he made the contract. Discuss rights of the parties.

CHAPTER VI

THE SECOND ELEMENT—THE SUBJECT MATTER

27. INTRODUCTION

1. Definition

28. FORBIDDEN CONTRACTS

1. Contracts Contrary to Statutory Prohibition
2. Contracts Contrary to Common Law Prohibition
3. Contracts Against Public Policy

29. WAGERING CONTRACTS

30. CONTRACTS MADE ON SUNDAY

31. CRIMES AND CIVIL WRONGS

32. SALES AT AUCTION

33. PUBLIC POLICY CONTRACTS

1. In Restraint of Marriage
2. In Restraint of Trade
3. Restrictions

34. EFFECT OF ILLEGALITY

35. QUESTIONS ON TEXT

36. ILLUSTRATIVE QUESTIONS

27. Introduction. Great latitude is permitted in making contracts, and only those that are judged to be against the best interests of the community are forbidden. The broad principle of the law applies, which is to permit one to make all contracts that are possible, denying only those that are considered objectionable on grounds of public policy and good morals.

1. Definition. The subject matter of a contract may generally

be defined as that which is to be done or that which is to be left undone.

Since the fundamental principle of our law is to allow everything except what is forbidden, it is necessary to discuss only those agreements that are illegal or forbidden. Certain agreements that are not allowed or not enforced, are prohibited largely from the standpoint of public policy and as a matter of protection to the public rather than to the individual.

28. Forbidden Contracts. The following are the classes of contracts forbidden or discouraged:

1. *Contracts contrary to Statutory Prohibition.*
2. *Contracts contrary to Common Law Prohibition.*
3. *Contracts against public policy or good morals.*

29. Wagering Contracts. Any contract that relies upon chance to determine the winning or result of the agreement is termed a wagering contract. The consideration is a certain sum that is payable by one to the other according to the result, while the loser receives no benefit. At common law such agreements, while not favored, were enforceable, but by statute they are generally declared illegal. Great difference is found in the different states, yet there is a general uniformity of decisions that wagers exclusively for gain are not enforceable.

From time to time efforts have been made to control dealing in "futures" or "options" but not with much success. In these agreements the buyer and seller agree that in the case of a rise or fall in price before a certain day one is to pay the other the difference between the two prices. This is a gambling proposition. The basis is, did the parties intend to deliver and receive the article? If not, the transaction is illegal. The milling business deals in futures as a protection against change in price as, for example, on May 1 a milling company receives an order for 1000 barrels of flour deliverable on September 1. The company pays cash for the wheat on May 1, but the price of the flour is as of September 1. A change in the price of wheat on those dates will produce an undesired loss or gain. The milling company is in business to make profit from the milling business and not from

a change in prices. In order to avoid the loss or gain from change in price, the milling company sells wheat on May first deliverable September first at the prices of that date. The gain or loss from the change in price is balanced and the company has its milling profits unimpaired. This is legitimate dealing in futures.

30. Contracts Made on Sunday. Again, the common law recognized no difference as to the day of contract; statutory law, however, has seen fit to enact that general business agreements may not be made on the Lord's day. Thus a contract of hire, an exchange of property, a loan of money, a demand of payment, and the making and delivery of a deed, made on the Lord's day, all have been held to be illegal contracts. However, if the contract is fully executed the law will not interfere. Contracts for necessities of life or of a charitable nature are enforceable, and so are contracts to preserve property.

Similarly, an enforceable contract cannot be revoked on Sunday. There is, however, a great difference of opinion as to whether a contract made on Sunday can be ratified later or not.

31. Crimes and Civil Wrongs. Any contract that is formed whereby an agreement is entered into to commit a crime, such as to commit an assault or to publish a libel, is illegal. All contracts of bribery of public officers, of a jury, etc., since they tend to prevent a faithful performance of public duty, are illegal. Contracts, the consideration of which is based upon acts of immorality, are illegal. All contracts whereby an agreement is entered into between two to defraud a third party are void. All transfers of property with the aim of defrauding creditors may be avoided. An adjustment of a debt by an insolvent debtor with one creditor to the detriment of others is illegal. (See Case No. 3.)

32. Sales at Auction. Any agreement entered into whereby fair competition is prevented at an auction is void. The employment of puffers or by-bidders for the purpose of enhancing value is illegal. The puffer cannot enforce his contract of sale, but a buyer may avoid his purchase if the bid immediately preceding his was fictitious. But an announcement stating that the goods will not be sold for less than a certain sum is legal.

33. Public Policy Contracts. Contracts that are not allowed on the ground of public policy, are declared illegal not because of a statutory enactment, but because such agreements encroach on the interest of the general public. Under the two former prohibitions the individual was considered; here the individual is not so much considered as is society. A contract to "corner," or control, the production of a commodity is void on account of public policy. If an agreement injures an individual, such an agreement injures the community at large, and this is the consideration that determines its prohibition. A contract to pay an additional fee to a public officer for regular services performed, is void; first, because of want of consideration, and second, the act tends to corrupt public servants.

1. *In Restraint of Marriage.* Any agreement whereby one is bound, generally not to marry, is void as against public policy. But if such restriction is limited in its scope as to a reasonable time, or as to certain individuals, it may be enforced.

2. *In Restraint of Trade.* Since the prosperity of the individual and the community is best served by allowing everyone freedom in making contracts, the law declines to enforce agreements in which a person agrees never again to enter into a particular line of work. Such agreements tend to restrict one's ability to earn a living. The public is deprived of one's service, and a tendency to promote monopolies results.

3. *Restrictions.* Reasonable restrictions upon trade as to time and territory, are binding. What are reasonable restrictions depends upon all the circumstances of each particular case. Agreements, for instance, whereby the seller agrees not to engage in competition for a short time, a few years, are generally considered binding. An agreement not to engage in the same business within certain limited territory is considered binding, or an agreement to pay a reasonable sum of money in lieu of damages in case of entering into competition, is binding. (See Case No. 4.)

34. Effect of Illegality. If the illegal contract has already been carried out, as where money has been paid or property delivered, it can in general be recovered. Especially is this true where the losing party is not in the wrong. A wrongdoer cannot take ad-

vantage of his own wrong to recover his consideration unless permitted by statute law, as in gambling debts. Where both parties are equally culpable in law, the court will leave them where it finds them, so far as enforcing the contract is concerned, although they may be prosecuted criminally where the act amounts to a crime, as where a bribery was attempted.

35. QUESTIONS ON TEXT

Define subject matter. On what grounds are certain contracts forbidden? What is a wagering contract and how is it treated in law?

A contracts with B to blow up the Court House. B proceeds to do so. A refuses to pay the price. Can B recover? Why? If A had paid the money could he recover from B?

What practice will void an auction sale? Discuss public policy.

When is a contract in restraint of marriage? When is a contract in restraint of trade? To what extent will restraint be considered reasonable?

36. ILLUSTRATIVE QUESTIONS

1. B contracts not to engage in the lumber business in a certain city for five years. B violates the provisions of the contract by engaging in the lumber business in the city named. Suit is brought for damages. Discuss.

2. E is a candidate for office and agrees in writing with F that if the latter will support him in the election he will appoint F to a certain office. E is elected and fails to carry out his agreement. F sues for damages. Discuss.

3. A public auction is being conducted and G bids \$500.00 on a certain horse. The owner has a certain H bid \$550.00. G bids \$575.00 and the sale is "knocked down" to him by the auctioneer. Later G learns the facts and refuses to take the horse and pay the price. Suit is brought. Discuss.

4. A statute imposes a penalty for the failure of a milk dealer to have his milk measures sealed by the proper officer. The milk dealer fails to observe this statute and sells milk using an unsealed measure. Later the dealer sues for the sale of the milk and the suit is resisted. Discuss.

5. A contract is made in violation of a statute that requires a certain form. Later the statute is repealed. Suit is brought on the contract and it is resisted. Discuss.



LORD MANSFIELD—WILLIAM MURRAY (1705-1793)

Lord Mansfield was educated at Westminster, Christ Church, Lincoln's Inn, and Oxford. In 1730 he was called to the bar. He took an active part in politics as well as in the law, was a leader in the House of Commons, and during this time there defended the prerogative of the king. In 1783 he was speaker of the House of Lords. Prior to that, in 1756, he was appointed to the position of Chief Justice of the King's Bench and created Baron Mansfield. He was made Earl of Mansfield in 1776.

The great reputation of Lord Mansfield rests chiefly on his judicial career. He has always been recognized as the organizer of mercantile law which he found in a chaotic condition, leaving it in a condition equivalent to a code. He was pre-eminently one of England's greatest jurists.

CHAPTER VII

THE THIRD ELEMENT—THE CONSIDERATION

37. INTRODUCTION

1. Definition

38. GENERAL RULES

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2. Necessity
3. Adequacy
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5. Impossibility
6. Moral Obligations
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39. FORM

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40. CLASSES

1. Formal Contracts
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41. WHAT THE LAW REQUIRES

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43. EFFECT OF NON-COMPLIANCE

44. RATIFICATION

45. PROVISIONS OF THE STATUTE OF FRAUDS

1. Promises of Executors and Administrators
2. Debt, Default, and Miscarriage
 - (a) Nature of Agreement
3. Agreements in Consideration of Marriage
4. Agreements for the Sale of Lands
5. Agreements Not to be Performed Within One Year
6. Sale of Goods
 - (a) Effect of Non-Compliance

46. QUESTIONS ON TEXT

47. ILLUSTRATIVE QUESTIONS

37. Introduction. In law every agreement, or contract, as it is usually called, must include something, capable of being reduced to money value, that passes from one party to the other. In the eye of the law, there must be in every agreement a benefit to the promisor or a detriment to the promisee. It is not necessary that the exchange of values should be equal, that being a matter of opinion between the parties themselves. The law does not attempt to enforce against a person a promise of a gift or any promise of a similar nature.

1. *Definition.* The consideration is the value attached to the thing to be done or left undone. This consideration is sufficient if it consist in "*some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.*" Again, the benefit need not necessarily pass to the party making the promise, but may pass to a third party. A makes a promise to B for the benefit of C, which is accepted by B; C may have action to enforce the acquired rights. (See Case No. 5.)

38. General Rules. 1. *Requirements:* (1) Necessity of consideration when contract is not under seal. (2) Adequacy of consideration. (3) Legality of consideration. (4) Present or future, executed or executory, but not past.

2. *Necessity.* Every man is bound to fulfill his agreements, but the law does not lend its aid in enforcing a contract or agreement that is not founded on a consideration. It is one of the essential elements and is that which marks the difference between a gift and a contract. A gift is never presumed. A promises to B a certain valuable picture. B cannot enforce this promise as it is not founded on a consideration. The court would say that B has not parted with anything of value or been to any inconvenience. On the other hand, A promises to deliver the picture to B for \$5 and B accepts. This is a contract. B may enforce this agreement upon making a tender of the money. Each has promised to part with something of value, which is the consideration.

3. *Adequacy.* The value of the consideration is not considered so long as a man gets what he has bargained for. Courts do not inquire into the equality of the bargain. The question is, "Was there a consideration, something of value given, or a detriment sustained?" The adequacy of the consideration is left entirely to the parties to the agreement; otherwise it would be "the law making the bargain instead of leaving the parties to make it."

4. *Promise Without Consideration.* A bare promise not supported by a consideration will, as was said, not be enforced by the courts. Moreover, if the thing promised has been carried out with a knowledge of both parties, the courts will not assist in enforcing the return of the thing promised. A may promise to give B a suit of clothes, or a father may promise his son a deed to a piece of property at his majority. These are bare promises and the courts will not assist B or the son in enforcing compliance. Moreover, if the clothes have been delivered, or the deed has been delivered, the givers will not be allowed to compel a return of the property or demand payment therefor. But if A agrees to sell to B a horse for \$100.00, and B accepts and pays the money to A, and if, when he calls for the horse, it develops that the horse was dead at the time of the sale, then this is deemed a failure of consideration, and the money received must be returned. When the promise or agreement is to be carried out in the future, it is said to be an executory agreement. When the delivery has been made, it is said to be an executed agreement. If there is no consideration the first is not enforceable, but the second, being completed, is binding.

Exception. If a party gives away his property without a consideration or for a grossly inadequate one, and by so doing is unable to pay debts already contracted, his creditors have a right to have the transfer set aside. A, who is about to fail in business, transfers a large amount of his property to B in order to keep it from his creditors. So far as A and B are concerned the transfer will stand, but the creditors who are thus deprived of payment may recover enough of the property from B to satisfy their claims.

5. *Impossibility.* If a contract is entered into which it is impossible to perform, it is void. The impossibility must be in the act rather than in the party who is to perform. If the act is

impossible for the party promising, but possible for others, it is his duty to perform. If A promises to release B from a debt due C, it is an impossibility from a legal standpoint. He must have authority to act. The promise of D to E on May first that a certain debt then due shall be paid by March first of the same year, is an impossibility and therefore void.

6. *Moral Obligations.* In enforcing agreements the courts look for a consideration, a benefit, or a detriment; hence, if nothing but a moral obligation is found to exist, it will not be enforced. In the eye of the law, no loss has been sustained, therefore no remedy can be had. It is not that the law refuses to countenance morality, but that the courts can only measure damages from the standpoint of gain to one party and loss to another. All men should live up to all promises made, but to be enforceable they must be based upon consideration. If payment has been made or any other performance had, a recovery for such may be made. (See Case No. 6.)

7. *Past Consideration.* A past consideration is receiving a benefit for which there is no legal obligation to reimburse. If, after receiving the benefit, the person assisted promises something of value as a recompense, the promise is not enforceable; e. g., A assists his neighbor, B, in putting out a fire. Sometime afterward B says he will give A a cow in payment for his services in helping to put out the fire. This agreement is not founded on a consideration and is therefore not enforceable. If, however, A had requested the other to do what he did, the law would imply a consideration which would be sufficient to support the subsequent promise or agreement. (See Case No. 6.)

8. *Mutual Promises.* Mutual promises will support each other, as each promise is the consideration upon which the other is based, as A promises to pay B \$1000 for an auto and B promises to sell this auto to A for \$1000. The promises are mutual and the contract binding. (See Case No. 7.)

9. *Part Payment of Debt.* "The payment of a smaller sum in satisfaction of a larger is not a good discharge of the debt." The debtor agreed to pay the debt in full; the part paid is but a consideration for that part of the debt; there is then no consideration for the balance. A owes B \$100.00. He pays \$80, receiving a

receipt in full and B's assurance that the debt is satisfied. B may nevertheless sue for \$20, the balance. But if the debt is not due it may be cancelled by the payment of a smaller sum, since payment before maturity is a benefit conferred and therefore a valuable consideration.

Exception. If the debtor does something different from what the creditor is entitled to demand, the debt may be cancelled by what in reality is a smaller sum. A owes \$100. If A gives B \$50 and a parrot in satisfaction of the claim, or pays a certain sum of money and a certain amount of labor, or makes the payment at a different place, the debt may thus be fully cancelled. The parties may agree to any value to the part that is different and they will be bound thereby. No such payment can, however, be made without the consent of the creditor. Also it has been held that if the receipt is duly executed under seal the whole debt is cancelled.

39. Form. The law establishes no particular form to many contracts, the fact that there is a contractual relationship being usually sufficient. Yet, in the making of a few kinds of agreements, because of the character of the subject matter and because of the fallibility of human mind, the law directs a certain form and solemnity.

1. *Statute of Frauds—History.* Over two hundred years ago the Parliament of England enacted one of the most important of written laws: viz., "An act for the prevention of frauds and perjuries." This act is known as the Statute of Frauds. Its influence extends throughout the English speaking world, and this act has been re-enacted in nearly every country under the authority of Great Britain and in nearly every state in the Union. Yet, enough modifications have been made to render it necessary, in all questions under this act, for the student to refer to the statute laws of his particular state.

40. Classes. The formality of contracts will be discussed under two heads:

1. *Formal Contracts.* These depend for their validity upon a specified form. Such are deeds, and, in fact, all contracts that are required to be under seal. The seal is said to import a consideration, or rather dispense with the necessity of proving one.

2. *Simple Contracts.* These depend for their validity upon consideration. They are subdivided into two classes: those that the law directs shall be formal and in writing in order that the evidence of the existence of the contract may best be preserved, and those that may or may not be in writing at the discretion of the parties to the contract.

41. What the Law Requires. The legal requirement is simple, the chief requisite being that some note or memorandum of the agreement shall be made, containing a description of the subject matter, stating the consideration for the same, and carrying the signature of the party to be charged or made liable. In order to protect both parties to the agreement, both should sign, as otherwise the contract would be enforceable from but one side.

42. What the Law Includes. It is now well established that the Statute of Frauds refers only to executory contracts.

43. Effect of Non-Compliance. The direction of the law is that the substance of the agreement must be reduced to writing. If this direction is not observed it does not affect the validity of the agreement. It directs, "No action shall be brought unless the agreement is in writing and is signed." The agreement is therefore unenforceable but not void. If the parties have formed the agreement verbally, they may still carry it out and their action will be legal, but the court will not lend assistance in enforcing the agreement.

44. Ratification. An agreement orally made contrary to the Statute of Frauds may be finally reduced to writing and signed and thereby become enforceable. The statute rather aims to secure written evidence of the contract in order that fraud may be prevented.

45. Provisions of the Statute of Frauds. This law enacts that "no action shall be brought:

(1) To charge any executor or administrator upon any special promise to answer damages out of his own estate, or

(2) To charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or

(3) To charge any person upon any agreement made in consideration of marriage, or

(4) Upon any contract for the sale of land, tenements, or hereditaments, or any other interest in, or concerning them, or

(5) Upon any agreement which is not to be performed within the space of one year from the making thereof,

Unless the agreement upon which such action shall be based is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

Following the enactment of the above, was an act relating to the sale of personal property, to wit:

"No contract for the sale of any goods, wares or merchandise for the price of ten pounds or upwards *shall be allowed to be good*, unless: A part of the goods so contracted for shall be delivered, or a part of the purchase price be given to bind the contract, unless the contract or agreement thereto be in writing and signed by the party to be charged." (The U.S.A. designates \$500 as the minimum.)

A number of the phrases above need explanation. Let us consider them.

1. *Promises of Executors and Administrators.* An executor or administrator is one appointed for the purpose of winding up the affairs of a deceased person. He is not personally liable except that he must follow the law in the distribution of moneys and payment of legal debts. If he personally agrees to pay some claim of the estate, his promise is not binding unless in writing. However, if he personally agrees to pay a certain sum to an heir if he will not contest the will or bring suit, he will be obliged to live up to this agreement, whether in writing or not, as the agreement is an original undertaking. A consideration must be shown for the agreement. For example, an executor says to an undertaker, "If the estate is not sufficient to pay your bill, I'll be responsible for the amount." The statement is within the statute and must be in writing to bind the executor. If, however, he says, "Charge the account to me personally," it is without the statute.

2. *Debt, Default, and Miscarriage.* When one agrees to answer for the debt, default, or miscarriage of another, three persons are considered: (1) debtor, (2) creditor, (3) the stranger who agrees to pay the debt for the debtor and against whom no previous liability existed. (See Case No. 8.)

(a) *Nature of Agreement.* The agreement may be original or collateral on the part of the stranger. If original, the agreement is without the statute and need not be in writing; if collateral, that is, dependent upon the debtor's paying, it is within the statute and must be in writing. For example, A says to B, "Let C have \$100 credit at your store, and if he does not pay I will." This is a collateral undertaking, and it is not binding unless put in writing and signed by A. If he says, "Let C have credit for \$100 and I will pay you," the agreement is original and is binding even though not in writing. If the debt has already been contracted, a new consideration must be given when the promise to pay is made by the stranger. This may be accomplished by the payment of something of value or by extending the term of credit. For example, A owes B \$250.00 which sum is past due. B demands payment and A expresses inability to pay at once. C, a friend of A, says "I will pay the amount due you if A does not." This offer, even if in writing, is not effective for lack of consideration, but if B on receipt of this written offer hands C one dollar and says "This is the consideration for your offer," the contract is now complete and binding. Or, if C writes as above inserting "in thirty days," it will be binding if accepted by B as this additional time is a detriment to B and is a sufficient consideration.

3. *Agreements in Consideration of Marriage.* This statute does not relate to the contract to marry which is based upon mutual agreements, but rather to agreements prior to and collateral to marriages; as, where one of the parties to the marriage agrees to make a settlement of a certain sum of money on the other, or a parent or some third party says, "Upon your marriage to a certain person I will deed to you certain property." Subsequent marriage will not take the contract out of the statute. All such agreements must be in writing to be enforced.

4. *Agreements for the Sale of Lands.* The word land here is

used in the broad sense of including not only land itself, but all claims thereto of a permanent character. (See Case No. 9.)

5. *Agreements Not to Be Performed Within One Year.* This clause relates to contracts that from their nature, or from the time when they are to begin, cannot be performed within the space of one year from the time they are made. The vital question is not was the contract performed within the prescribed time, but was it capable of being performed within a year from the date of making. If A contracts with B to-day to work for him one year, beginning the first of next month, this is clearly within the statute. A contracts with B to work two months for him, but no time is mentioned as to the date of beginning. The agreement is without the statute and need not be in writing—it is capable of being performed within one year. (See Case No. 10.)

6. *Sale of Goods.* Many questions arise under this section that make the settling of the question difficult. There are probably more decisions under this section that cannot be reconciled than under any statute ever enacted. One reason for this lack of uniformity is that generally a side element causes the trouble, such as an element of labor in a contract for the sale of certain chattels. The decisions divide on whether it is a sale of goods or a contract for labor. (See U.S.A.) (See Case No. 11.)

(a) *Effect of Non-Compliance.* A few states have excluded altogether this section of the Statute of Frauds relating to the sales of personal property. Unlike the first section, this enacts that the contract shall not be good, therefore a failure to reduce the agreement to writing would make the agreement void and not merely unenforceable.

46. QUESTIONS ON TEXT

Define consideration.

What effect does inadequacy of consideration have on a contract? Why?

Can a promise not supported by a consideration be enforced?

When will inadequacy of consideration be a ground for setting aside a contract?

A contracts to do a thing which is impossible of performance. Is he liable under the contract? A contracts to do a thing that is impossible for him to perform, but possible for someone else. Is he liable?

Is a contract enforceable that is based purely on a moral consideration? Why?

Is a past consideration sufficient to support a contract? Discuss fully.

When will the part payment of a debt discharge the whole debt? And when not?

A owes B \$500. With B's consent he pays him \$200 and a horse in satisfaction of the debt. Does this discharge the debt?

What is the purpose of the Statute of Frauds?

What are formal contracts? Simple contracts?

Enumerate the main provisions of the Statute of Frauds and discuss each one.

47. ILLUSTRATIVE QUESTIONS

1. A sells B a horse valued at \$300 for \$50. Later he demands the return of the horse on the ground of inadequacy of consideration. Discuss rights.

2. C realizes that he is going to fail in business and transfers to a friend valuable real estate and personal property for a small cash consideration. His failure is announced and the creditors find no property but do find evidence of late transfers. Discuss rights.

3. D owes E \$500 which is due. E accepts in full payment \$350 giving a receipt for \$500. Later he changes his mind and sues for the balance, or \$150. Discuss the rights of the parties.

4. Same as in (3) but D pays E \$350 and a box of cigars. Discuss the rights of the parties.

5. F owes G, a merchant, \$400 which is past due. G asks for payment. F replies that he cannot pay now but will be able to pay in a couple of weeks. H, a friend of F, overhears the conversation and says to G, "If F does not pay you I will," and hands G a memorandum to that effect. Later H refuses to pay. Discuss the rights.

CHAPTER VIII

THE FOURTH ELEMENT—THE AGREEMENT

48. INTRODUCTION

1. Definition—Express or Implied
2. Offer
3. Acceptance—Exception
4. Time

49. OPTIONS

50. APPARENT CONSENT

1. Mistake of Fact
 - (a) Effect
2. Misrepresentation
 - (a) Effect
3. Fraud
 - (a) Classes of Fraud
 - (1) To Defraud Each Other
 - (2) To Defraud Third Persons
 - (b) Effect of Fraud
4. Undue Influence
5. Duress

51. QUESTIONS ON TEXT

52. ILLUSTRATIVE QUESTIONS.

48. Introduction. The fourth element in a contract contemplates that both parties have complete knowledge of the facts and that they know they are forming a legal relationship. It may be that where the words show consent the law may look beyond to determine whether the apparent consent is in fact consent as required by the law. There must be a "meeting of minds" to satisfy the law.

1. *Definition.* Agreement is the formation of a distinct common intention to do or not to do a particular thing. This agreement may be either express or implied. It is express where the

terms are fully understood and consented to by both parties; implied where from the acts or relationship of the parties the law presumes a contract has been made and supplies the lacking element in order properly to adjust and protect their rights and liabilities. The law, however, does not establish a contract where the partial agreement relates wholly to an executory agreement. A benefit or detriment must have been sustained.

The agreement may be resolved into two elements; viz., offer and acceptance. They frequently take the form of question and answer; as, "Will you give me \$100 for this horse?" "I will." This is an express agreement.

2. *Offer.* The offer is the first step toward making a contract, and is simply a proposition or a question; as, "I wish to buy," "I wish to sell," or "Will you buy?" Since it affects but one party, it may be withdrawn at any time before acceptance by the other party.

3. *Acceptance.* Acceptance is the step taken by the second party to the contract relation whereby the offer of the first party is assented to. Unlike a proposition, it cannot be withdrawn. It completes the contract, and affects the legal relations of both parties. There must be a communication of the mutual intentions of the parties in order that an agreement may result. A secret, unexpressed intention to accept cannot in any way affect the relations of either party.

Illustration. "I will sell you this horse for \$100," is a proposition. The following would be an acceptance: "I will pay you \$100 for that horse." "All right, I will take the horse at that price," or "It is a bargain." The acceptance might also be made by a nod of the head or a sign. These would not be acceptances: "I will pay you \$100 for the horse tomorrow;" "I will pay you \$95;" or even "I will pay you \$105 for the horse;" or "I will take the horse at the sum named, but you must take your pay in goods from my store." These replies constitute counter-propositions. After such a proposition has been made, the parties cannot then accept the first proposition. A counter-proposition is a refusal of a proposition and the substitution of a new one.

The acceptance to be binding must not change the offer in any particular. It must be absolute; no conditions may be added. A conditional acceptance is no acceptance. It is equivalent to

saying, "I am not satisfied with your proposition, but I will take it and make certain changes in it and submit it to you as an offer of my own for your acceptance." The original offer hereby loses its vitality, being, so to speak, passed by in the course of the negotiations so as to be no longer pending between the parties, and it becomes an open offer again only when renewed by the party who first made it. If the proposition is made to a particular person, it cannot be accepted by another. A man has a right to select those with whom he will contract. The acceptance may be implied from the acts of the parties, no set form being required. The law imputes to a person an intention corresponding to the reasonable and honest meaning of his acts as well as his words. These two elements (offer and acceptance) may be given orally, in writing, or one may be spoken and the other put in writing, and the result will be a contractual relationship.

Exception. The Statute of Frauds specifies that certain contracts must be in writing and signed. (See Chapter VII.)

4. *Time.* Time is an element of agreement in the relationship of offer and acceptance. Where the parties are together, nothing being said as to time of acceptance, it is understood to be immediate, and if the acceptance does not promptly follow the proposition, no agreement, or contract, will result.

When the parties are separated by some distance and the mails are resorted to, some time must be allowed; as in the following illustrations: A, of Chicago, writes B, of New Orleans, that he will sell him 500 barrels superfine flour at \$7.50 per barrel, mailing the letter September 1st. Flour advances in price and A concludes to withdraw his offer, so he writes and mails B a withdrawal of the proposition on September 2d. B receives A's first letter on September 3d and immediately mails his acceptance. The contract is complete and binding because B had no way of knowing that a letter of withdrawal had been mailed, and therefore was guided by the letter already at hand.

A letter withdrawing a proposition is not operative until delivered. A letter of acceptance is binding as soon as it is mailed. The same rule would hold true in regard to telegraphic communi-

cations. The acceptor must be guided by the proposition as to the means of communication to be adopted in each case. If the proposition is in form of a letter and says, "Answer by mail," or is silent on the point, a letter in answer is sufficient. If a telegraphic offer is received, an answer of like kind should be given. If directions are given in the proposition, they must be complied with. Any other method is simply a counter-proposition and may be rejected by the one making the original proposition. An acceptance forwarded by some other means than that contained or intimated in the proposition, is not binding until a proper delivery has been made. Such an acceptance is at the risk of the sender. The weight of authority is that it is optional as to whether the proposer need recognize such an acceptance.

49. Options. In the course of forming a contract, the proposer may give the other party a certain time to consider the matter. This is giving an option or refusal. If the one to whom the option is given pays something of value to the proposer, it is binding, and the proposer has no right to withdraw his proposition, which may be accepted at any time before the expiration of the stated interval. If, however, no consideration is given, the proposition may be withdrawn at any time. The weight of opinion seems, however, to require a notice of withdrawal to be effective. This notice need not be formal or direct.

50. Apparent Consent. Apparent consent to a contract may arise from several causes, the main ones of which are, mistake, misrepresentation, fraud, undue influence, duress.

1. *Mistake of Fact.* It is a well-settled principle of law that a man is bound by all his agreements that are entered into with full understanding, but if the agreement entered into is the result of a mutual mistake, it is voidable. Where each of the parties knows with whom he is dealing, where both mean the same thing and have formed correct conclusions as to the subject matter, there can be no mistake. A mistake in reference to the nature of the transaction is rarely met. There may be a mistake as to the person, but most mistakes relate to the subject matter. Mistake of subject matter may arise as to its existence, its identity, its

essential nature or qualities, its quantity, or its price. Mistake of person exists where A, of Chicago, supposes he is contracting with B in San Francisco, whereas in fact it is not B but B junior, who has succeeded to his father's business. Such mistakes may also arise where there is an undisclosed principal. (See Case No. 12.)

(a) *Effect.* Where there is any effect from this, the result is to render the contract voidable. If executory, the contract may be repudiated. If executed in whole or in part, what has been paid may be recovered. In equity, suit for specific performance may be resisted, or suit may be brought to declare the contract void. If the mistake is merely in drawing, the contract may be re-formed. The relief must be sought within a reasonable time after knowledge of the mistake.

"We think that no case can be found where a court of equity has relieved a party on account of a mistake which was made through the mere carelessness and negligence of the party asking relief, where there rested a duty upon him toward the other party to use care and diligence not to make a mistake."

Generally, a mistake of fact furnishes ground for relief while a mistake of law does not.

2. *Misrepresentation.* Misrepresentation is very closely related to fraud. Generally the former is an innocent misstatement, or the non-disclosure of a fact which should be disclosed, while the latter consists in making a false statement knowingly, or making a statement in reckless disregard of its truth or falsity with the intention that the person to whom it is made shall act upon it. Mere expressions of opinion or commendatory statements are not misrepresentations. (See Case No. 13.)

(a) *Effect.* The contract is voidable. Mere misrepresentation has no effect except in contracts said to be of the "highest faith," in which, from their nature and peculiar circumstances, one party must rely on the other for his knowledge of the facts and the other is held to the utmost good faith. Such contracts include those between persons occupying confidential relations, as guardian and ward, trustee and beneficiary, principal and agent, attorney and client; contracts of life, fire, and marine insurance; and to a certain extent contracts for sale of land.

3. *Fraud.* Fraud may be defined as "every kind of artifice

knowingly employed by one person for the purpose of deceiving another to his injury." In order that fraud may exist, there must be a false representation of a material fact, knowingly or recklessly made with the intention that the other party shall act upon it, who, in fact, does rely upon it to his injury. Fraud makes a contract voidable. (See Cases Nos. 14 and 15.)

(a) *Classes of Fraud.* (1) To defraud each other. (2) To defraud third persons.

There is little difficulty in understanding the conditions in the first. In the second, however, we find some of the most difficult questions for settlement. Many examples of this kind of fraud are found in the case of failures. It will frequently be found that the one failing in business has transferred a considerable amount of property to some friend, and, as a result of this, creditors may not be able to obtain satisfaction for their claims. Such transfers are fraudulent and therefore voidable. Such transfers, so far as the creditors are concerned, may be set aside and sufficient property received to satisfy the creditors' demands. If, however, the failing party is able to show that at the time he sold or gave away the property he had a sufficient amount to pay all debts and claims then existing, the transfer cannot be set aside. If the transfer is to a creditor in satisfaction of a debt, it is valid, as a debtor may show preference in the payment of debts. Bankruptcy laws, however, generally require ratable payment of claims. (See page 78.)

(b) *Effect of Fraud.* The defrauded party may keep the goods and claim damages, or he may rescind the contract and demand the return of anything delivered. He is not obliged to return the goods, but if he wishes not to be bound he must not receive any benefit under the contract or he will be held to have affirmed it. He must also rescind and notify within a reasonable time after knowledge of the fraud. Aside from the contract, the defrauded party may have an action for the deceit, sue to recover what he has parted with, or resist an action at law on the contract. These are law remedies. In equity he may demand the cancellation of an instrument or its re-formation.

4. *Undue Influence.* It sometimes happens that the relationship of the parties to a contract is such that undue influence may cause

one of the parties to enter into an injurious contract. Undue influence is said to exist where a party to a contract has not acted of his own free agency, but where action in the matter has been controlled by the will of another. A good illustration is a contract between a guardian and his ward. Although the ward may be of age, yet the contract must be formed with the utmost good faith or it will be voidable. (See Case No. 16.)

5. *Duress*. If force is used to induce a party to enter into a contract, it is voidable. This force may consist in a threat to do bodily injury, or an unlawful arrest and imprisonment, and is commonly called duress. Such contract wherein duress is employed is voidable. As soon as a party is free from the force or threat, he must disaffirm the contract or it will be binding. The detention or threatened destruction of a person's goods may constitute duress. (See Case No. 17.)

51. QUESTIONS ON TEXT

Define agreement. Distinguish between express and implied agreement. Define offer and acceptance. Illustrate.

What is the effect of an acceptance that varies the original offer? When must an offer be accepted? May an offer made to A be accepted by B? Define and illustrate Mistake and Misrepresentation, Fraud, Undue Influence, Duress. State the effect of each of these where they enter into a contract.

52. ILLUSTRATIVE QUESTIONS

1. C wrote W, "Upon agreeing to finish the fitting up of offices 57 Broadway in two weeks from date, you can commence work at once." W accepted, but did not communicate this fact to C. He did, however, purchase the lumber and prepared to begin work. The next day C withdrew the offer. Was there an acceptance? Why or why not?

2. A says to B, "I will sell you my horse for \$200 and will deliver him to your barn next Monday." To this B replies, "All right, I will hand you the money at that time." Is this a contract? Why?

3. Again, A and B are walking together and A announces, "I will give you \$200 next Monday." B announces at the same time, "I will give you my horse worth \$200 next Monday." Is this a contract? Why or why not?

4. Mr. Harsh wrote the Nebraska Seed Company of Omaha, "I have about 1800 bushels or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want \$2.25 per cwt. for this seed f. o. b. Lowell." The seed company accepted by wire and directed shipment to which Mr. H demurred. Did the parties form a contract? Was Mr. H's letter an offer or was it a basis for an offer? (N. Seed Co. v. H, 98 Nebr. 89.)

CHAPTER IX

THE OPERATION OF THE CONTRACT

53. INTRODUCTION

54. ASSIGNMENT

1. By Agreement of Parties
2. By Operation of Law

55. RIGHT ACQUIRED

56. WHAT CANNOT BE ASSIGNED

57. LIABILITY OF ASSIGNOR

58. QUESTIONS ON TEXT

59. ILLUSTRATIVE QUESTIONS

53. Introduction. While we have found that there must be at least two parties to a contract and that those parties are the only ones affected by the contractual relationship, yet we shall find also that the rights and even the liabilities of others may intervene. He who interferes with the operation of a contract, thereby causing one of the original parties to suffer loss or detriment, is liable in damages. In this chapter we have to deal largely with the conditions whereby one or more of the parties to a contract is changed for another who takes his place.

54. Assignment. Here one's rights under a contract are transferred to another, the new party assuming the place of the one going out. The one assigning his rights is called the assignor, and he to whom they are assigned, the assignee. Assignment of a contract is brought about in one of two ways: first, by agreement of parties; second, by operation of law.

1. *By Agreement of Parties.* Since the parties formed the contract by agreement, it must necessarily follow that they may

agree to change its terms. If A has agreed to build a house for B for \$1,000, it may be agreed that C shall be substituted in the place of A. B is now obliged to pay the money to C, the latter agreeing to erect the house. It is now generally held that it is not necessary to have the consent of B to enable A to transfer his interest in the contract to C. Of course, however, A cannot escape liability; but the principal thing to B is the building of the house according to agreement, and if C complies with the terms of the contract he is entitled to the payment of the agreed sum.

But, while a right is assignable, yet a liability is not assignable. It is not necessary to secure the permission of the debtor to the transfer of a debt.

A, for instance, owes B \$100. A cannot transfer his liability to B over to C, but B may transfer his claim against A to C.

2. *By Operation of Law.* By operation of law, rights and even liabilities may be transferred to another. At common law the husband acquired his wife's property and also became liable for her debts contracted prior to marriage. Death passes title of personal property to the administrator or executor of a deceased person. Contracts that depend upon personal services terminate upon the death of the party obligated. Upon entry of a decree of bankruptcy, title passes to the receiver or trustee.

55. Right Acquired. Under an assignment, the assignee acquires only the right possessed by the assignor. The assignment, so far as assignor and assignee are concerned, begins as soon as the assignment is made, but, in order fully to protect the rights of the assignee, notice must be given to the debtor. The debtor has a right to know to whom he is liable, as he naturally believes he owes the original creditor until he is notified to the contrary. As soon as he receives this notice he must not pay the first creditor, as he would still be liable to the assignee. The notice need not be formal; it is sufficient if the debtor has knowledge of the transfer. Anything that puts him on inquiry is all that is required. For instance, A owes B \$1,000 for building a house. He pays \$300 on the agreement. The payment is not acknowledged on the agreement, but he has good evidence of payment. On September 1st B assigns the claim to C for \$1,000.

C, however, acquires a right to enforce collection of but \$700. He acquires only B's interest. On September 5th A pays B \$200. There having been no notice given to A, C can now collect but \$500 from A. However, C would have a claim against B for partial failure of subject matter.

56. What Cannot Be Assigned. A contract, the subject matter of which is personal services, cannot be assigned. A agreed to paint a portrait of B. He cannot assign this contract to C.

57. Liability of Assignor. The assignor of a contract or right impliedly guarantees that the claim is good; that he has a good title; that the debtor is competent to contract; and that he has the right to assign.

58. QUESTIONS ON TEXT

Define assignment. Distinguish between assignment by agreement and assignment by operation of law. What are the rights of the assignee? What cannot be assigned? What is the liability or undertaking of the assignor?

59. ILLUSTRATIVE QUESTIONS

1. A owes B \$150 which is in the form of a statement that A has O.K.'d. B sells the account to C who later demands payment from A. Discuss relationship of parties.

2. D and E have bought from and sold produce to each other. They check up accounts and agree that the balance is \$425 due from D to E. The latter transfers the account to F. After this transfer D, who has had no notice of the assignment, pays E \$125 and takes his receipt for the sum. Later, F demands the full payment of \$425 from D who refuses. Discuss relationship of parties.

3. G, a noted portrait painter, agrees to paint a portrait of H for \$500. He starts the portrait and then transfers his contract to I, an equally capable artist. To this H objects and refuses to pay for the portrait. Discuss relationship of parties



SIR WILLIAM BLACKSTONE (1723-1780)

An English jurist, educated at Pembroke College, Oxford. Having made a choice of the law, he was entered in the Middle Temple in 1741, and called to the bar in 1746. He is the author of *Blackstone's Commentaries*, an exposition of the common law. This treatise is written as four books (published in two volumes), dealing respectively with rights of persons and things, and public and private wrongs. He was by no means a great jurist and his writings are not accepted by lawyers as of great legal weight, but they have rendered much the same service to educated society of England that the Institutes did to Rome and the students of the civil law.

CHAPTER X

THE INTERPRETATION OF THE CONTRACT

60. INTRODUCTION

61. PROOF OF CONTRACT

1. Oral
2. Written
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60. Introduction. Under previous sections we discussed, first, the manner of forming a contract and the elements that are essential; and, second, the operation of the contract, those whom it affected, and those who might acquire rights or assume liabilities under it. We are now to discuss the rules that are followed in explaining the meaning of the contract—how we prove the contract and determine what it means. This section will be dealt with under two heads: (1) proof of contract; and (2) construction of contract.

61. Proof of Contract. 1. *Oral.* When the contract is formed orally, the terms of the contract can only be established by means of witnesses, parties who have knowledge of the agreement.

2. *Written.* The existence of a written contract is established by producing the writing. It is the evidence of the intention of the parties and must be produced unless lost or destroyed, in which case its terms must be established by parol evidence. If the contract is partly written and partly printed, as is usual in business papers, and there is an inconsistency, the written parts prevail. (See Case No. 18.)

3. *Sealed.* The existence of a sealed instrument also is established by the production of the writing. A parol contract depends upon a consideration for its validity, while a sealed contract depends upon its form. In the former the consideration must be proved; in the latter it is presumed. The former is the evidence of the contract, while the latter is the contract.

While parol evidence is not competent to "change, vary, or contradict" the terms of a written contract, it is always permissible to deny the force and validity of such a contract. It may be shown that the instrument was executed through mistake, fraud, duress, without consideration, or by an incompetent party.

Oral evidence is also admissible where the submitted agreement is not complete. This must not vary the writing, but must supplement it. It is also permissible and sometimes necessary to resort to parol evidence to establish either the identity of the parties or the subject matter.

62. Usage of Trade. Frequently it is necessary to ascertain the usage or custom of trade in order to determine the true meaning of a contract. In commerce words frequently have a technical meaning aside from their ordinary signification. This technical meaning may be established by parol evidence. In a celebrated English case, in the transfer of a large number of rabbits, it was contended that the word "thousand" meant in that trade 100 dozen, or 1,200. It was so established by parol evidence. So, likewise, has it been shown that "thousand" meant seven hundred, a day but 10 hours, and so on.

1. *Essentials to Usage of Trade.* Not every technical term or distinction may, however, be explained by introducing evidence of usage in trade. A usage of trade must be established, it must be uniform and certain, it must be general, it must be continued,

it must be known, it must have been adopted, it must not be in opposition to the contract, it must not oppose a statute, and finally it must not conflict with public policy. Custom can make law but cannot repeal law. (See Case No. 19.)

63. The Construction of the Contract. *Intention.* The fundamental rule applied to the interpretation and construction of a contract, is to get at the intention of the parties who formed it. The courts will grant the use of every means to effect this end. Words are to be understood in their ordinary meaning, except, as was said, in cases of special trade usage. A person is presumed to have used the language necessary to express his intentions. The instrument as a whole must be looked at, and, if possible, be so construed as to give it validity.

64. Secondary Rules. It is not necessary for the written instrument to consist of but one document; it may be made up of a series of correspondence. If so, and if these refer to each other, they must all be examined and construed together to determine the precise nature of the agreement.

1. *Time.* Time also is an essential element in the construction of a contract. If no specified time is named, it is understood to be present time, and the agreement is to be carried out within a reasonable time. A contract may, by naming a certain date, make it obligatory upon one of the parties to perform promptly on or before the date named, under penalty of releasing the other party and also of making himself liable to the other party in damages. If, however, it can be shown that the date mentioned is considered as an approximate one, equity will come to the relief of the party obligated and allow a reasonable time for fulfillment of the agreement. The parties, however, may make the date an essential. (See Case No. 20.)

2. *Penalty and Liquidated Damages.* In order to secure prompt performance of a contract, parties quite frequently insert an additional clause stating, if the contract be not executed in a certain manner and by a certain time, the delinquent shall pay to the other a certain sum of money or suffer some other damage. Such agreements are frequently made, and the courts constantly at-

tempt to lessen the liability if the agreements are unreasonable. Two reasons may be assigned for inserting these additional conditions: first, to fix in advance the damages that a non-performance might be deemed to produce, known as liquidated damages; second, to fix the amount of damages so high as to act as a punishment. In enforcing these agreements courts are not bound by the name applied to the damages. It is sometimes called a penalty and again liquidated damages. If the subject matter is of a certain value and the damages may be computed, excessive damages will not be allowed. If, however, the contract is of such a nature that no certain value can be named, then the amount of damage is left as a matter of agreement with the parties.

A agrees to build a house for B for \$2,500, finishing it May 1st. A penalty clause is added which provides that if the house is not completed by that date, A is to pay B \$100 per day for each day after May 1st until completion. This is called a liquidated damage clause, the damage being stated. This is clearly unreasonable. The court will allow B to collect the actual damage only, which would be measured by the loss of the income. If, however, the contract were of such a nature that the value of the subject matter could not be determined, then the sum agreed upon could be collected. (See Case No. 21.)

3. *Entire and Divisible Contracts.* Whether a contract may be divided into several contracts or be construed as a single contract, is sometimes of vital importance to one of the parties. If, in a series of deals entered into at the same time, the contract has for each item of subject matter a separate consideration, it is said to be divisible; while if one consideration was given for several subject matters it is deemed to be entire. A, for instance, agrees to sell B one horse for \$150, a wagon for \$75, and a set of harness for \$75. This agreement may be in writing and properly signed. Enumerated as stated, it would be divisible. If the agreement called for one horse, a wagon, and a set of harness for \$300, the contract would be entire. If in the first case the horse was killed and therefore became impossible of delivery, A could still insist on B's taking the other articles, although he might not want either one of them without the horse. In the second case the contract would be annulled. (See Case No. 22.)

NOTE. If the U. S. A. has been adopted in the state, the student is directed to the section on "delivery" for additional information on entire and divisible contracts.

65. QUESTIONS ON TEXT

How do you prove an oral contract? A written contract? May parol evidence be introduced to change, vary, or contradict the terms of a written contract? What exception is there to this general rule?

What are the essentials to a usage in trade? What is the fundamental rule in the construction of a contract? Mention some secondary rules of construction.

What is meant by liquidated damages? Distinguish between a penalty and liquidated damages. Illustrate. Distinguish between an entire and a divisible contract. Illustrate.

66. ILLUSTRATIVE QUESTIONS

1. The Acme Co. contracts with A to act as traveling salesman at a contract price of \$5000 a year payable monthly and the usual expenses. It is also agreed that A is to receive a commission of 10% on all sales over \$25,000. The above facts are reduced to writing, except that the contract reads "a commission on all sales, etc." The contract is duly signed. The sales for the year amount to \$51,000. A demands 10% commission on \$26,000. The company refuses since the written contract does not name a rate. Discuss rights of parties.

2. K contracts with the Lawson Contracting Company to construct and erect a modern twenty-four apartment building in your locality. The contract price for the work and materials is \$30,000.00. The building is to be ready for occupancy by the first of October. There is a clause in the contract that the construction company agrees to pay K the sum of \$200.00 a day for each day after the last day of the month before the first of October. The building is turned over to K on the 25th day of October. K's renting agency had all but four of the apartments leased to begin the first of October. Is the \$200.00 a penalty or a liquidated damage? You are engaged by K to settle or bring suit. The construction company will resist.

CHAPTER XI

THE DISCHARGE OF THE CONTRACT

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79. ILLUSTRATIVE QUESTIONS

67. Introduction. Before discussing the discharge of a contract it will be well to recall the ways by which the contractual relationship is brought about. The fundamental principle of allowing everything except what is forbidden is found here to be an underlying principle. What parties have agreed to do they may also agree not to do, but each new agreement must be based on a sufficient consideration. When suit is brought by a claimant the other party must defend himself. All the right is not necessarily on the side of the party bringing suit. The reason why a party refuses to perform his part of an agreement may be because the other party has not done as he agreed to do.

68. Ways of Discharge. 1. *Agreement.* An agreement may relate to everything that is legal. If a contract is executory in its nature it may be mutually dissolved, each release being the consideration upon which the other relies. If the contract is executed in part or wholly on one side, no mere release will be sufficient; it will not be based on a consideration. A, for instance, agrees to deliver to B 100 bushels of wheat, if B will agree to work for A 50 days. The wheat is partly or wholly delivered. It is

then agreed that the contractual relationship shall cease. Still, notwithstanding this agreement, A may sue for the value of the wheat delivered.

2. *New Agreement.* By the common consent of the parties a new agreement, or one materially changed in part, may be substituted for the old one, the new rights and liabilities being sufficient consideration for those released. As to whether an oral agreement shall be allowed to be substituted for an old one, depends upon statutory requirements. Generally, any form of contract may be changed by an oral agreement, particularly where the agreed changes have first been acted upon by the parties.

3. *Implication.* This new agreement may be by implication. Wherever the parties carry out an agreement in ways that are inconsistent with the former agreement, the change will be understood to have resulted from a new agreement. While these new agreements more frequently relate to the subject matter, they may equally well relate to the consideration or the parties—in the first by increasing or decreasing the consideration, and in the last by a substitution of some third party.

A, for example, owes B \$50 and B owes C \$50. The parties agree that A is to pay C the amount. B is cleared from indebtedness and C's claim is against A. A substitution similar to the above may arise from implication, as where A and B agree that A shall be liable to C. The latter has a right to object, but if he accepts part or whole payment from A, treating it as A's debt, it will be implied that he agrees to the substitution.

4. *Conditions.* The relationship between the parties may be based on a condition, the happening or non-happening of which is to have a certain effect on the contract. If this condition to a contract is not fulfilled the party aggrieved may, as a rule, treat the contract as discharged. If goods received are not up to conditions stated, they may be returned within a reasonable time. The conditions that enter into contracts are well illustrated in a bond. Here one party obligates himself that in the non-happening of a certain event he is to assume certain liability; at the happening of the event his bond is terminated.

5. *Performance.* When the terms of the contract have been fulfilled the parties are released, the contractual relationship

between them having then been completed—each has received that for which he contracted. Each party, however, must have lived up to the agreement in order to have a complete performance. One party may be able to show performance while the other may not. In carrying out the provisions of a contract it is generally sufficient if the contract is substantially performed. When you have done what you agreed to do you may plead performance and escape liability from damages.

If the contract has been executed on one side only, it is not discharged by the one entitled to claim the benefit saying that he waives his right. A release must have a consideration unless executed under seal. A agrees to work for B one month in payment for 100 bushels of wheat. At the end of the time he receives 75 bushels and then says he will waive his claim for the balance. This last agreement is not binding, as there is no consideration to support it.

69. Tender. The right to insist that A shall live up to his agreement depends upon whether B has performed his part. You may sue in enforcement of a right only when your part is performed. A agrees to sell and deliver a certain horse to B in consideration of B's paying \$100. This is a contract. A now has acquired a right to the money, B has acquired a right to the horse. Neither has a right, however, to sue the other or insist on the other's carrying out the agreement until he has himself performed what he agreed to do. If A delivers the horse to B, he may then sue for the money, or B may offer the money and demand the horse.

1. *Definition.* Tender is the offering or attempting to do what you agreed to do. It is very important to know that in order to perfect a right you must first make a tender; your obligation may be to do something or to pay something. When in some contested case you may employ counsel, you may at once be asked the question, "Have you made a tender?" "No." Then your right may be lost.

2. *Requisites.* In tendering payment the following points must be observed:

First. The tender must be in the exact amount due.

Second. It must be unconditional.

Third. It must be in the legal currency of the country.

Fourth. It must be actually offered, so as to afford an opportunity to accept or reject.

Fifth. It must be kept alive; that is, you must be ready to pay it at any time subsequent to the first offering.

3. *Obligation to Pay.* In all cases it is the duty of the debtor to seek the creditor at the proper place and offer the exact sum of money on the date due. You have then made a good tender. If the money is of the kind sanctioned by law you have made a legal tender. The tender must be without conditions. You have not even the right to demand a receipt as a condition precedent to your paying. If, however, you are paying a note or a draft, you have a right to demand the cancelled instrument as a receipt. You must offer the money to the creditor. It is not enough to say, "I want to pay my account." The money must be produced and offered. (See Case No. 23).

(a) Legal Tender. This is tendering not only the exact amount, but also the kind of money that is within the limits of the law. The following are the amounts and kinds that have legal tender properties:

(1) Gold coin (\$2½, \$5, \$10 and \$20), any amount.

(2) Silver dollars, any amount.

(3) Fractional silver (50c., 25c. and 10c.) not to exceed \$10.

(4) Nickel and copper (5c. and 1c.) not to exceed 25c.

In addition to the above the following classes of paper money are issued:

(5) United States Note (Greenbacks); Treasury Notes; (7) National Bank Currency; (8) Federal Reserve Notes; (9) Federal Reserve Bank Notes; (10) Gold Certificates; and (11) Silver Certificates.

NOTE. Some of the above possess full legal tender properties and some qualified as to what the payment is for. Some are legal tender for public debts but not for private debts. The student is directed to the printed matter on each note as to its legal tender properties.

Illustrations. On a debt of \$85.60 A tenders a one hundred dollar bill and demands the change; A tenders B the exact amount of a debt but demands a written receipt; A tenders the exact amount of a debt but this amount includes some English money; A says, "Well, Mr. B, I am here to pay you my debt," but he does not produce the money and offer it; A tenders in payment of a debt of \$100 the following: \$80 in gold, \$12 in fractional silver, and \$8 in nickels and pennies; A meets B, his creditor, on the street and tenders the

amount of the debt. In each case the offer is refused. State the grounds for refusal and the effect of the tender.

(b) *The Effect.* As soon as a legal tender is made it stops the accumulation of interest on a claim, and if the tender is kept good by the debtor's being able at all times thereafter to pay the debt, it is a good defense against a claim for interest and if suit is brought, the one bringing suit must pay the costs. After a claim is due, a good and legal tender may be made by adding the legal interest for the time the claim is past due.

4. *Obligation to Do Something.* This relates to agreements where the payment is to be made in some personal property other than money. The tender can be made only with strict reference to the due date. If it is made on the proper date and is refused, the debtor is released from his obligation. For example, if A agrees to sell B a horse and deliver it on May 1st in satisfaction of an old claim, he must tender it on that date. If, when the horse is tendered to B, he refuses to receive it, A is released from his agreement. The title to the horse passes to B and A may resist suit for the enforcement of the agreement. A must take proper care of the horse and turn it over when demanded, but must be reimbursed for expenses. If A does not make delivery on the proper date, he loses the right to cancel the debt by making the delivery of the article, and the fulfillment of the contract rests with B. It is optional with him. If the property in question has advanced in value, he will doubtless demand it, while if it has decreased he will call for the money on the contract basis. Ponderous articles, such as logs, may be delivered by pointing them out.

5. *By Whom and to Whom.* While the obligation is from debtor to creditor, the tender may be legal when the duty is performed by another generally known as agent of the debtor. Likewise, a tender to an agent of the creditor who has authority is legal.

70. Discharge by Payment. Tender is the offer made by the debtor to the creditor according to the terms of the agreement, and the acceptance of the tender will constitute payment.

1. *Definition.* Payment is generally the performance of a contract by giving a sum of money, and may be set up as a defense.

If payment is not made as agreed, nominal damages, interest for additional time, will be allowed.

2. *Duty of Debtor.* It is the duty of the debtor to seek the creditor and make payment according to the agreement. If there are any terms or conditions, he must comply with them or he will suffer the loss, if any. If the debtor makes use of an agent, the mail, for instance, he takes the accompanying risk. If the creditor gives any special directions as to the way of sending the money, the debtor may comply and the risk is with the creditor.

3. *Negotiable Instrument as Payment.* Whether the giving of a note or a draft constitutes payment is not wholly a settled question. If the instrument is given at the time the debt is contracted, it is generally considered a means of securing payment, and is not payment itself. In the first case, if the negotiable papers are not paid when due, suit will have to be brought on the note or draft in question, while in the second case suit can be brought on the original contract.

4. *Note of Third Person.* If the note of a third person is given, it is generally held to be a satisfaction of the original claim, whether given at the time of making the contract or at a later date.

5. *Forged Notes or Counterfeit Money.* Payment made in counterfeit money or forged paper, whether innocently or not, is not a legal payment. It is the duty, however, of the one receiving such payment to object within a reasonable time. If the notification is given promptly the debtor may be able to trace the source from whence he received the counterfeit money. Therefore, if the notice is not given within a reasonable time, it cannot be returned, and the creditor will not be allowed to collect his claims.

6. *Standing of Receipts.* When a receipt is given it is *prima facie* evidence that payment has been made. Yet one important rule of evidence does not apply. It may be shown that the receipt was given in mistake or that the term "in full of account" should read "on account." Parol evidence is always admitted to explain a receipt.

7. *Application of Payments.* While it is the duty of the debtor to pay his obligations, he has a right to insist, where he owes several separate debts, that the payment shall apply to some particular one. The creditor has a right to refuse to receive payment

under such terms, but if he accepts he must apply it as directed. Where the payment made is equal to one of the debts, it is presumed to be a payment of that account. Where no directions are given, the creditor may apply to any debt that is due. He may even apply payment to an account that is unenforceable or outlawed owing to length of time. This payment, however, does not revise the balance of the debt. After he has made the application he cannot change. (See Case No. 24.)

71. Discharge by Impossibility of Performance. This may arise from the fact that at the time of making the contract it was impossible to perform, or such a condition may arise after the contract is formed. In the first case there is no very difficult legal problem; if known to both parties, there is no real consideration to support the contract, but, where the impossibility develops subsequent to the making of the contract, it is more difficult to adjudicate. Three questions are suggested: Was the impossibility unknown to both parties? Was it unknown to the promisor? Was it unknown to the promisee?

1. *Performance of Promises Required.* The general rule is that a person must perform all his agreements since they are of his own making. He can have no excuse to offer. A distinction must be made between an act that is impossible in itself and an act that is impossible for a particular person to perform. If a person wishes to provide against, and protect himself from, disastrous consequences in case of impossibility, he must insist on such a condition at the time he makes the contract. Upon agreeing to sell and deliver goods to B, A cannot thereafter plead that it would be dangerous to deliver the goods on account of local disturbances and therefore he ought to be excused. A agreed to furnish horses according to a contract which contained a clause allowing the buyer to change the specifications. Upon such change being made, A was not allowed to plead that he could not find such horses. If the obligation to perform is imposed by law, it is always reasonable, and if performance becomes impossible the promisor is excused. The common law excuses a common carrier from liability in case of an act of God. If the obligation is undertaken by the promisor with full knowledge that

it may result in impossibility of performance, he is nevertheless liable on the contract. If a common carrier specially contracts against all loss, it is immaterial as to the cause of loss. If the promisor conditions his agreement to the possibility, the promisee takes the risk. If the promisor makes an unconditional promise, he must stand the loss in case of impossibility to perform.

Exceptions. A person is excused from performing a contract, first, where the act is rendered impossible by operation of law; second, where it is evident that the parties intended the contract to apply to present conditions and not to changed ones. If the contract is to do one of two things and one becomes impossible, the other must be performed. This is the case where at the time of making the contract one was possible and the other impossible, also where both at the time of making the contract were possible and one becomes impossible.

72. Discharge by Operation of Law. The relationship of the parties since the contractual tie was formed may become such that the law declares a release is brought about. This will be discussed under five heads: alteration, merger, loss, bankruptcy, and death.

1. *Alteration.* If the contract is materially changed or altered as to its legal effect, it is optional with the other party as to whether it shall stand or be declared void. The alteration must be made intentionally and by the party interested, not by a stranger. It must be made without the consent of the other party. It must be made after the delivery of the instrument and before its promises have been carried out. It must be natural and it must be made with intention to defraud. (The changing of the date of maturity of a promissory note would be fatal.)

2. *Merger.* The right to enforce a claim may merge into a higher claim, thereby cancelling the first or lower security. A suit may be maintained on a contract, and, if a judgment is secured, the contract debt is merged in the judgment debt. For example, A has a simple contract with B. Later the same terms are included in a formal contract under seal. The former contract is merged in the latter.

3. *Loss.* The common law recognized no remedy in case a written agreement was lost. Equity, however, has provided a remedy, generally requiring an indemnity bond against loss.

4. *Bankruptcy.* Bankruptcy proceedings regularly instituted and completed, release one from further liability. By a provision of the Constitution of the United States, Congress has the power "to establish uniform laws on the subject of bankruptcies throughout the United States." A state bankruptcy law would be unconstitutional.

"A bankrupt law enables a person who is unable to pay all his debts to divide what property he has among his creditors proportionally and to be discharged from legal obligations to make further payment. The moral obligation to pay one's debts in full still exists. Congress has absolute power in the matter of bankruptcy, but it has not exercised this power continuously. The present bankrupt law was passed in 1898."

(a) *Acts of Bankruptcy.* The National Bankruptcy Act defines five specific acts of bankruptcy as (1) Fraudulent conveyances; (2) preferential conveyances; (3) preferences obtained through legal proceedings; (4) (a) general assignments; (b) application for a receiver, while insolvent; (c) appointing of a receiver because of insolvency; (5) admission in writing of one's inability to pay debts.

(b) *Administration.* By "the administration of an estate" is meant the taking charge of the affairs of the bankrupt by the administrator. His duties are (1) to obtain control of all property belonging to the bankrupt and to recover all money due; (2) to obtain the highest returns and to make distribution according to the terms of this act.

The title to the bankrupt's property rests in the administrator or trustee.

(c) *Receivership.* The appointing of a receivership is for the purpose of conserving the property during the litigation of certain questions. A receivership is generally in relation to a going concern and the receiver carries on the business in the interests of the litigants under order of a court. The chief distinction between a bankruptcy proceeding and a receivership is that the former is the winding up of a business and the distribution pro rata of the receipts while the latter holds the business while in full operation.

(d) *Object.* The object of a bankrupt law is to secure an equitable distribution of a debtor's effects and property among

his creditors and also to give a person who has gone through an honest but unfortunate failure a chance to recover and accumulate property for his own and his dependents' welfare. Such proceedings do not cancel the balance of the debt but constitute a complete defense against any action for the recovery of the unpaid balance.

5. *Death.* Death releases a party from a contract if the relationship is personal in nature. If, however, the contract related to property rights it must be carried out by his personal representatives.

73. Discharge by Breach. When the party obligated refuses to perform his part of the contract or will not allow the other party to perform, there is said to be a breach of contract. The breach may be in whole or in part of the contract. This brings about a legal relationship whereby the injured party has a claim for damages. He has a right of action.

1. *Breach Before Performance.* In this stage the contract is executory—each party has a right to have the contractual rights continue and their execution fulfilled at the proper time. To constitute a breach the renunciation of the contract must be complete. Where A made a contract for service with B and was informed by the latter that he need not report for duty, it was held to be a breach of contract, and suit was maintained before the time for performance of the contract.

Where a party to a contract has made it impossible to perform by his own actions, the breach is complete. If the performance has been commenced and there is a renunciation by either party, or an act by one that makes performance impossible, the injured party has a right to payment for the part performed and to damages for the rest. (See Case No. 25.)

74. Accord and Satisfaction. When a party (to a contract that has been violated by one or both) discusses and agrees upon the amount of damages due from one to the other, there is said to be an accord. When the agreed sum is paid there is an accord and satisfaction. Accord is no defense. Accord and satisfaction is a

good defense against subsequent suit for damages for a breach of contract.

75. Set-Off. It frequently happens that in a controversy as to damages caused by breach of contract, there are several claims to be considered. The placing of one set of claims against the other is known as set-off, a judgment for the balance being entered, which may be in favor of either party. Set-offs are favored in law, as they simplify matters by adjudicating several claims at the same time. These several claims must be mutual ones and all due at the time of suit. (See Case No. 26.)

76. Statute of Limitations. 1. *Lapse of Time Bars Action.* While a person's right of claim against another is not satisfied until paid or in some way cancelled, still the State directs that such rights of claims shall be prosecuted within a specified time. The State does not approve of slothfulness. If there were no limitations as to the time during which claims could be enforced, it might open the door to fraud. A dishonest creditor might attempt to enforce a claim when he felt assured that the debtor had destroyed or lost receipts, or that his witnesses were dead or removed from the State. The State acts on the presumption that if you have not enforced your demands within this specified time there must be some reason why they should not be enforced or that after the specified time the debt is presumed to be paid. The States are not agreed as to the time within which suit may be brought. Generally the period of five years is established for open accounts and ten years for written contracts. (See Case No. 27.)

2. *When the Statute Begins to Run.* In a general way we say it begins to run the day that suit might be entered for the enforcement of the claim. A buys goods from B on 30 days' credit. At the expiration of the credit named, B may bring action for the amount of the sale. He must bring his action within the time designated in his State or he has given the debtor a complete defense against its collection. There are a few exceptions favorable to the plaintiff that when named are apparent: Minority, coverture, imprisonment, and insanity, provided the right of action had not commenced before the disability occurs, as in the case of

imprisonment or absence from the State. The time begins to run at the expiration of such disability.

If a debtor removes from the jurisdiction of the court where the claim is recoverable, the statute ceases to run and will not commence until his return, which must not be in a secret manner.

3. *Removal of Bar.* The statute does not extinguish the claim but acts as a bar to suit for recovery. The defense of limitation must be set up by the defendant. When the statutory period has run, the claim may be brought to life in one of several ways: (1) The debtor may make a promise to pay—usually the law provides that this must be in writing. It is generally held that a mere acknowledgment of the debt is sufficient. (2) A part payment of the claim with an intention of paying the whole claim, will revive the balance of the claim. If a debtor owes his creditor two distinct claims, one barred and the other not barred, and he makes a payment to the creditor without naming the account on which he desires it credited, the creditor may apply on the barred claim, but it will not revive the balance of this debt. (3) The payment of interest on such a loan will revive the debt the same as a part payment.

When a barred claim has been revived by an acknowledgment, part payment, or payment of interest, the claim revives on that date and the statute again begins to run.

77. Damages. 1. *Law.* Whenever a party violates his obligation in a contract, he is guilty of a breach of contract, and the remedy is damages, the measure of which is determined by the application of certain rules, some of which are as follows:

The amount claimed must be comparable with the injury.

When the action is for a money debt, only interest may be added.

Damages "must be certain, both in their nature and in respect to the cause from which they proceed." (See Case No. 28 a, b, c, and d.)

2. *Equity.* This is a procedure for a remedy wherein a money damage will not satisfy the conditions. The two principal remedies are (a) injunction and (b) specific performance. (a) An injunction is an order of court directing that a certain act shall not be done or directing that a certain act shall be done. The

former is resorted to more frequently and is known as a prohibitory injunction. For example, A is constructing a "spite" fence between his own and B's lot. This fence will cut off the light or view or both from B. It is objectionable and injurious to B's property rights. An injunction may be granted forbidding the construction of the fence.

(b) Specific performance is a decree of court whereby a party is directed or ordered to do a specific thing or act that he has already lawfully agreed to do. For example, A agrees to sell and convey a certain piece of real property to B for a certain agreed price. This agreement is in writing and duly signed. Later, B refuses to make the transfer; that is, issue the deed as required. A court will decree specific performance; that is, direct B to carry out his contract with A.

In this case money damages would not satisfy A. He wants that particular piece of real property and another piece even of the same value will not satisfy him. Had the contract been for, say, 1000 bushels of wheat a refusal to deliver could be remedied by the payment of money damages as the same grade of wheat can be bought in the general market.

78. QUESTIONS ON TEXT

Enumerate the different ways in which a contract may be discharged by the act of the parties. Illustrate discharge by agreement; by new agreement.

Define tender. Enumerate the requisites of a valid tender. What is the effect of tender. What distinction is there between tendering money and tendering a chattel?

What is payment? Discuss payment by means of negotiable instruments; by means of counterfeit money.

What is the effect of a receipt? What is the rule in regard to the application of payments? When is a promisor relieved from performing his contract on account of impossibility, and when not? Enumerate the different ways in which a contract may be discharged by operation of law.

Define merger. Illustrate. How is a contract discharged by breach? Illustrate. What is an accord and satisfaction? A set-off? Is accord without satisfaction a good defense?

What is the Statute of Limitations? Discuss the theory. When does the statute begin to run? What is the effect upon a debt after the specified period has run? What exceptions are there to the operations of the statute? What will operate as a removal of the bar imposed by the statute?

79. ILLUSTRATIVE QUESTIONS

1. A and B have entered into a written agreement whereby B is to act as bookkeeper and cashier for A in his store at \$50 a week for a term of one year.

Before B goes to work it is agreed that B shall act instead as traveling salesman for A at the same salary with the addition of expenses. A memorandum to this effect is penciled on the back of B's contract and initialed by both parties. B goes to work, but on his return from his first trip A objects to his continuing as salesman and insists on the first contract, saying there was no consideration for the second contract. Discuss rights of parties.

2. A owes B \$300.00 on account. He pays B \$200.00 on account and receives in return a receipt for this amount reading "in full of all demands to date." Later B sues for the remaining \$100.00 and A's attorney offers this receipt in defense. Discuss rights of parties.

3. Again, but the debt is in the form of a promissory note. It is due and E makes a tender and demands the note as a condition precedent to the payment. F refuses and later enters suit. E pleads tender. Discuss.

4. G owes H \$1000.00 on account which he tenders H at his place of business in legal tender money. H refuses and says, "It is after banking hours and I am afraid that I will be robbed." That night G is robbed. Later H sues and G pleads tender and payment of the debt in that he merely from necessity was keeping H's money and is not liable for the loss. Discuss.

5. I goes through bankruptcy and the creditors receive $66\frac{2}{3}\%$ on the dollar. Later I inherits a considerable fortune and the former creditors engage an attorney with a view to the collection of the remaining $33\frac{1}{3}\%$. Discuss rights of parties.

CHAPTER XII

A LESSON ON EVIDENCE

80. INTRODUCTION

81. HEARSAY

1. Exceptions

82. BOOKS OF ACCOUNTS

83. LOOSE LEAF

84. ALTERATIONS AND ERASURES

85. ACCOUNTS

1. An Account Rendered

2. Character of Accounts

86. QUESTIONS ON TEXT

80. Introduction. Mr. Brown: "Mr. Ernst, I have prepared a little talk on what we lawyers are pleased to call 'evidence.' Now I imagine you are already thinking 'Why, that's why we have you on our pay-roll, to take care of the evidence in court trials'; but is it? No, you are hiring me to keep you out of trouble, not to get you out of trouble after you get in. The wise firm today is trying its best to keep out of court and that is why many eminent lawyers are carried as consulting members of business organizations.

"The application of evidence or the using of it in a court is a lawyer's business, but the saving of evidence is the business man's duty. If you have no available and admissible evidence, your lawyer has little chance of securing your rights. Evidence is based on common sense and logic.

"Now, Mr. Ernst, I want your office to have records kept in such a way that I can establish all just claims of your firm and defeat all unjust claims against your firm. Therefore, I am going to take you on a trip through business evidence.

"Quite a bit of it is of a professional and somewhat technical character, yet I think you will not only be interested but benefited by the knowledge acquired, as you will help me the better to render efficient services to your firm.

"Briefly, there are criminal as well as civil cases. I hope we shall keep out of the former. Congress is constantly passing laws regulating commerce, the violation of these laws being made a crime, consequently we must know what to do and what not to do. Now in a criminal case the evidence must be *conclusive*, that is, certain, no other conclusion being possible; while in civil cases a *preponderance* of evidence is sufficient, that is, weight and credibility against weight and credibility.

"The *preservation* of evidence is the business man's duty. Now what must you preserve? Certainly all written records that have to do with your business, such as correspondence received and the answers; telegrams in and out; receipts of payments; canceled notes and checks; duplicate bills; receipted bills; memorandums, such as are required by the statute of frauds; records in books of accounts, such as journal, sales book, cash book, certificates of public accountants, advice of attorneys, and many other records that are of vital interest and of protective value in conducting business.

"There is a *presumption* in your favor when you hold in your possession certain evidence such as contracts carried out or completed. You probably have in mind such material."

"Yes," replied Mr. Ernst, referring to a filing case. "Here is a note of ours issued some time ago; it is past due and stamped 'Paid'; and here are some checks from our bank all properly indorsed and canceled."

Mr. Brown: "Yes, that is correct, and those items are the very best evidence of payment. Again," taking a check from the package, "here is a canceled check. This morning you received a letter from this party asking you for the payment of this amount. What is the presumption?"

Mr. Ernst: "I should say the firm was mistaken or it might be that the signature in the endorsement is a forgery."

Mr. Brown: "That's correct; the presumption is that everything is correct and in your favor. If they wish to overcome this,

they must furnish evidence to that effect or prove their case. In any event, you have your bank back of you.

"The question frequently arises, 'Which evidence must I present,' and the courts reply, 'the *best evidence*.' That is not very clear and this brings us to the consideration of two very important rules of evidence. (1) The first rule relates to proving *oral* and *written* contracts. Oral contracts are established by word-of-mouth statements, that is, witnesses to the contract testify as to its terms; written contracts are established by the production of the instrument itself.

"To illustrate, A agrees orally to do some repair work for B for \$100.00, and to do the work within a week. C was present and heard the conversation. In case of a trial C could be called as a witness to testify as to the conversation.

"Again, D agrees to repair E's barn for \$250.00, and to do the work within 10 days from today. This agreement is put in writing and signed. Each one has a copy. F and G were present and heard the conversation. F and G could not be used as witnesses to prove the agreement. The written agreement itself is the *best evidence* of the agreement and must be introduced in court. That is why all agreements, when possible, should be put in writing. A simple memorandum initiated by the parties is sufficient.

"The rule is that oral evidence is not admissible to contradict, change or vary the contents of the written agreements.

"This does not mean that a written contract may not be denied by oral evidence because of fraud, misrepresentation, duress, undue influence, or mistake, but that a written contract clearly stated must stand as stated.

"However, oral evidence may be necessary to explain the meaning of a term used, or to establish the custom of a line of business as to terms used, as for example, 'substance of conversation between A, a merchant, and B, a salesman, terms of employment one year, to begin December, 1924, salary \$5000 a year, commission 5% on all sales, and a commission of 10% on sales in excess of \$25,000.'

"C and D were witnesses to this conversation.

"On reducing the above conversation to a written contract the

'10%' was omitted. As the contract reads it says, '*commission on sales in excess of \$25,000.*'

"Oral testimony may be used to explain the meaning of the word '*commission,*' that is, the rate, and C and D may be called as witnesses. But it would be otherwise if the phrase '*and a commission of 10% on sales in excess of \$25,000,*' had been omitted from the written contract."

Mr. Ernst: "Am I correct in saying that if I had sold say \$35,000 worth of goods that I would not get the 10% commission on the extra \$10,000?"

Mr. Brown: "That's it exactly. You would get only what your written and signed contract calls for."

Mr. Ernst: "Yes, but I have two witnesses, C and D, who heard us talk over the contract."

Mr. Brown: "That may be, but they will not be permitted to testify with the object in view of putting something into the contract. The contract stands as read."

Mr. Ernst: "But it isn't the contract we talked about."

Mr. Brown: "But it is the contract you signed. However, if you wish to attack or to defeat the contract you may call in C and D as witnesses to prove that the contract was entered into through mistake or fraud. This would defeat the entire contract, if you were successful, and you might not want to do that. Does that make the rule clear, Mr. Ernst?"

Mr. Ernst: "Yes, I think so, in that if witnesses were permitted to change or modify a written contract, a business man never would know the standing of a contract. At any time the contract might be changed in this way and some of these witnesses might be perjuring themselves to help out some one in the deal."

Mr. Brown: "That's right, the rule may work a hardship at times but the remedy is *know what you are signing*, and when a contract is made that contains many provisions be sure that a note is made of each one as talked over, then check the list against the written contract and there will be no trouble later because some item was omitted.

"Now we are ready for rule number two: This relates to presenting claims against deceased persons' estates. If the agreement was oral there will be difficulty in establishing the claims. As the

party interested in the claim cannot establish it by his testimony, he must have witnesses to assist him or the claim will not be allowed."

Mr. Ernst: "Then our firm is going to have trouble in collecting a claim we have against Mr. Wohld, deceased, as I made the agreement with him and we made no written agreement, but the work was done for Mr. Wohld."

Mr. Brown: "Let us see about that. Did your workmen do the work and did your accounting department make a record from their report?"

Mr. Ernst: "Yes, they did."

Mr. Brown: "Then you have other witnesses who can testify that the work was done by your firm for Mr. Wohld."

"The question as to who must first establish his claim may be of interest to you. It is, however, a professional question and is known as the *burden of proof* rule. It is simply that he who asserts a claim must furnish the proof of his claim, after which a denial may be entered. For example, in a civil case A claims B owes him \$500.00. A must first establish through evidence his claim, then B makes his defense, which may be the Statute of Limitations, a counter claim, failure of consideration, or some other defense. Again, for example, A brings action against B for the payment of a certain horse. The burden of proof is on A. He must prove a consideration. Again, A sues B on a promissory note. The presumption of a consideration is in favor of A, the burden that there is no consideration is on B.

"I am going to have you read the following and we will cover it in our next review lesson. I shall expect you to cover the Application of Court Decisions to Facts and the Hypothetical Problems."

81. Hearsay. This is the kind of evidence that attempts to establish facts through an intermediary. It is something of a "second hand" character. Such evidence does not rest solely on the witness, but on the truthfulness of some other person. This evidence is not open to a searching examination as to its truthfulness and is therefore generally excluded. It is not the best evidence.

1. *Exceptions.* There are some well-known exceptions to the

rule relating to hearsay evidence, and they relate mostly to records that a business man may keep, as in a set of bookkeeping books. These records may not constitute more than memorandums made by the party interested and in his own behalf.

82. Books of Accounts. The nature of such evidence as that recorded in books of accounts is that it is hearsay and therefore to be excluded. But custom and the exigency of business are such that courts have modified the rule from time to time and statutes have been enacted until today books of accounts are regularly admitted in evidence. Certain requirements are necessary in their presentation, as:

1. The records must have been made in the regular course of business.

2. The records must have been made at the time the transaction took place.

3. It must be the original entry.

4. Alterations and erasures may affect the standing of the record but will not bar their introduction unless tainted with fraud.

Journals, sales books, purchase books and cash books have been admitted as books of original entry, but the ledger, as ordinarily kept, is not a book of original entry. It may be used, however, to trace items to the original books of record and for the purpose of refreshing the memory of a witness.

83. Loose Leaf. The introduction of loose leaf records was first opposed as evidence, owing to the ease of change and substitution; but at the present time, records of this character are regularly admitted as evidence. This stand admits as evidence a wide range of records, such as memorandum books, carbon copies, sales sheets, photostat, records on slates, penciled notations on shingles, and many others have been admitted. The test seems to be: "Were the records honestly made out and with the intent of making a charge against another party?"

84. Alterations and Erasures. The fact that a record has been altered, or an erasure made, does not of itself debar the record

from evidence, but it does affect the credibility of the records. It is largely a question of honesty and intent, yet one should not so keep his accounts as to have his honesty questioned. As it is practically impossible to prevent some mistakes, the corrections should be made in such a way as not to lead to intimations and insinuations that they were not honestly made. This is possible by making the change, for example, by crossing out in red ink the first entry or amount and writing in the correct amount. This leaves the entry open for examination and its correctness is apparent. Erasures should never be countenanced on books of record.

85. Accounts. An account is a record of an item, or a series of items, representing the relationship of debtor and creditor as existing between two parties. If it has items entered from time to time, it is called an *open account*. If the account exhibits debits and credits as the result of barter or any exchange whereby goods are debited and credited, the account is a *mutual account*. For example, a farmer brings eggs, poultry, and vegetables to a country store, receiving at that or some other time dry goods, groceries, and so on.

1. *An Account Rendered* is the usual statement rendered to customers, usually at the end of each month, and shows a balance. If this statement is not objected to within a reasonable time, the burden of disproving an item or items is on the party receiving the statement, and is then known as an *account stated*. An account stated may also arise when the debtor and creditor check over the items and come to an agreement as to the balance. If suit is entered at the later period, the account stated may be introduced in evidence and it is not necessary to prove each item from books of original entry.

When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party, who may prove fraud, omission, or mistake, and in these respects he is in no wise prevented by the omission implied from his silence after the account was rendered.

The statement from a bank shows the old balance, deposits, and checks drawn, together with canceled checks and vouchers in

an account stated and any objection must be made within a reasonable time. (See Cases 29 a-b-c-d-e.)

2. *Character of Accounts.* What constitutes a set of books or what is a bookkeeping record, is a question of wide application. It includes any kind of a record that may be made by a party in the usual course of the business he is doing. If the record is honestly made, it is admirable as evidence in establishing a claim. In a New Hampshire case a lot of timber was measured and the number of feet marked on the end of the logs with red chalk. A teamster engaged to haul this timber, on passing his home with a load of timber, copied on a slate the amount of each timber. Later, his wife and daughter with his assistance copied the several amounts in a memorandum book and erased the writing on the slate. This book was admitted in evidence as an original entry. (See Case No. 30.)

86. QUESTIONS ON TEXT

What is evidence? What is proof? What is included under preservation of evidence?

What is presumptive evidence? Give examples. What is meant by natural consequences of evidence? Give an example. What is best evidence?

Give two important rules of evidence. Why not allow oral evidence to change written evidence? May a written contract be denied as to its standing? Give some reasons for defeating a written contract. Why is the second rule so strict in excluding the testimony of the one who has a claim against an estate? What is meant by the burden of proof? What is hearsay evidence? Why excluded as a general rule? What is the nature of the principal exception?

What is a set of books? What are loose leaf records? Are they generally used today? How should an alteration in a record be made? Why not make a very careful erasure?

What is an account? What is a mutual account? What is an account rendered? When does it become an account stated?

CHAPTER XIII

HOW TO DRAW UP A CONTRACT

87. POINTS TO BE OBSERVED

1. Caution
2. Short Contract

88. CONSTRUCTION WORK—Directions

87. Points to be Observed. When a contract of importance is made the substance of the conversation should be reduced to writing and signed by the parties, and each should have a copy. Particularly should these directions be followed if the contract is to continue in force for some time or if it contains many provisions. Remember, however, that while a verbal contract is just as valid as a written one, it is not so easily proved. An oral contract that is disputed or denied must be established by the testimony of witnesses. A written contract is established by its production.

1. *Caution.* Since it is advisable to reduce important contracts to writing, the rule, "no oral evidence can be admitted to explain, vary, or contradict that which is written," must be kept in mind. The written contract must contain the four principal elements of contracts together with such additional and modifying matter as may be desired. Grammatical error will not affect the validity of the contract. No special form is necessary. State clearly the intention of the parties. The contract should be signed in duplicate and each party should have a copy.

Frequently it is desirable to have an agreement evidenced at once. A memorandum agreement may be drawn up and signed subject to substitution of a more formal and exact contract later.

A contract that is to continue executory for a considerable time and that contains many provisions should be drawn by a professional. (See Case No. 18.)

2. Short Contract—Merchant and Clerk:

"This agreement made this first day of July, 1925, between E. C. Coe, and James Leffring: Witnesseth that it is agreed that the said E. C. Coe shall faithfully serve the said James Leffring as a bookkeeper in the store of the said James Leffring for the period of seven months from and after the first day of August, 1925, then the said James Leffring shall pay the said E. C. Coe the sum of seventy-five dollars per month, payable monthly on the last working day of each month of this contract.

Signed in duplicate on the 1st day of July, 1925.

E. C. Coe.

James Leffring."

88. Construction Work. *Directions.* Supply all necessary names, terms and descriptions not given. The teacher will give amounts and other limiting data.

1. Draw a short contract between A and B, one to sell and the other to buy a team of horses; consideration, \$300, in three payments of \$100 each, first payment one month after date of sale. Warrant the horses "broken to double harness and sound."

2. Draw an agreement to sell and buy seven articles of personal property.

3. Draw an agreement to sell and buy a piece of land. Describe location of land in general way. Assume a mortgage and agree to furnish an abstract. Also a warranty deed is to be given.

4. A agrees to sell to B the following described property: One horse, "Duke," at \$250; one horse, "Walter," at \$225; one set double harness at \$200; one light buckboard at \$175. Draw the agreement once as an entire contract and again as a divisible contract.

5. Draw an agreement (1) in accordance with the first clause of the Statute of Frauds.

6. (2) In accordance with the second clause of the Statute of Frauds. (a) Contract executed. (b) Contract executory.

7. (3) In accordance with the third clause of the Statute of Frauds.

8. (4) In accordance with the fourth clause of the Statute of Frauds.

9. (5) In accordance with the fifth clause of the Statute of Frauds.

10. (6) In accordance with the section of the Statute of Frauds relating to the sale of goods.

CHAPTER XIV

A READING LESSON IN REVIEW

Mr. Brown: "Ah! good morning, Mr. Ernst, and how is our young disciple of Blackstone progressing?"

Mr. Ernst: "Good morning. I am doing fine. I am surely interested in the work. I have a question or two that I want explained. Otherwise I am ready and eager for the quiz."

Mr. Ernst, handing Mr. Brown a written form: "Just a minute, before taking up the quiz. Here is an outline of a sales agreement that our firm desires to put out. We want to be sure that we are complying with the law in all respects and that our firm and our salesmen are fully protected."

Mr. Brown: "I shall be pleased to look over the agreement, make such changes as are necessary and draft a correct contract. I notice that there are many important points. It is the proper thing to do to have all such agreements in writing. I'll have this ready for your firm in a few days."

Mr. Brown: "Now what's on your mind about the law lessons?"

Mr. Ernst: "Well, first I am not clear on 'options.' In a previous illustration given, A offers a certain horse to B for \$400.00. B wants the horse but hasn't got the ready money. So A says to B, 'I'll keep the offer open until two o'clock tomorrow afternoon.' To this B agrees. B then borrows the money from his banker, paying interest at 6% for 90 days. He then goes to A on the following morning and offers the money for the horse. A says it is too late, that he sold the horse yesterday. Now, why isn't the interest that B paid the consideration and why isn't A compelled to keep his agreement, namely, keep the offer open for the given time?"

Mr. Brown: "I see. Now let us examine the question from all angles. To hold two parties to an agreement, there must be a contract between them; there must be present the four elements

to a contract and in particular must there be a consideration between them which must be a benefit or a detriment to change the agreement into a contract and therefore binding."

Mr. Ernst: "That's it. Why isn't the interest paid at least a detriment and therefore the consideration?"

Mr. Brown: "The payment of the interest is the consideration to the agreement between A and his banker and does not affect B, who is not a party to this deal, therefore this benefit or detriment, as you term it, does not affect B."

Mr. Ernst: "I guess that clears up that point, but what about B's promise. He broke that, didn't he?"

Mr. Brown: "Yes, he certainly broke his agreement with A. He should not have done this if he has any regard for his reputation. It is as we say in law, a 'moral obligation.'"

"However, I might add that I am pleased that the moral side appeals to your sense of right. Let me tell you, my young friend, that if more business men looked more to the moral or ethical side of business questions, this world would be a better place to live in and there would be less criticism about what is right and what is wrong."

Mr. Ernst: "My next question is about the case, Nebraska Seed Company vs. Harsh, quoted last in Chapter VIII. Why isn't Mr. H.'s letter an offer?"

Mr. Brown: "It does look a little as though Mr. Harsh was making an offer, but if you examine the language used 'I want' so much for the grain, you will see that it is a general proposition and not a specific one. He doesn't say 'I'll sell you at such a price' but 'I want or expect to get so much.' He is asking the Seed Co. to make him an offer. It was up to the Seed Co. to reply 'We will take your millet at the price quoted.' This would have been an offer to buy which Mr. H. could accept or reject. Let me ask you this question: 'What results if Mr. H. had sent out ten such letters to as many seed firms and five of them had accepted'?"

Mr. Ernst: "I see; it is somewhat like an advertisement in a newspaper. It is a request for propositions, not for acceptances."

Mr. Brown: "That's it. However, one must be careful in making statements that are not perfectly clear to the one receiving.

Many, many suits like this one are based on faulty construction of language used in letters and telegrams. The court in this case favored Mr. H.'s statement as a statement on which an offer to buy could be based. Some other State court might not have agreed in the interpretation. The moral is, know what you want to say and say it in clear-cut, understandable language."

Mr. Ernst: "My last question must be concerned about torts. As I understand it, for example, our firm is liable for all damages to others caused by the carelessness of, say, our delivery men, but not for maliciousness. Where does one end and the other begin?"

Mr. Brown: "First, carelessness and maliciousness are not related at all. Carelessness, indifference, and thoughtlessness are incidents that may enter into the doing of any particular act, as in the delivery of goods; your driver may accidentally or carelessly injure another person or the property of another. He didn't intend to do this, it was an accident and your firm must pay the damages. You should not have such people in your employ, yet such an accident might happen to the most careful of us in our work. But maliciousness is another thing. For example, one of your drivers dislikes C, a driver of one of your rival companies. Your man, say, deliberately drives so as to upset C's car and in so doing C is injured and the car is damaged. This act on the part of your man is independent from your employment of him. You didn't even imagine such an incident let alone contemplate or countenance it when you hired him. This is maliciousness. Damages caused from such an act carry no liability on your part. If suit is brought against your firm, you might have trouble in proving it to be maliciousness unless your man is honest enough to say that he intended to do what he did. This is a question of proof and not one of law. Proof and facts may not agree. An innocent man may at times be convicted because of false or mistaken testimony. The law is what it is. Proof is what we establish as a finding."

Mr. Ernst: "This clears up all the difficulties I experienced."

Mr. Brown: "Now, Mr. Ernst, you will find a set of questions in review of what you have covered in this envelope (Reference Book). I wish you to write out your answers without any reference to your text book."

CHAPTER XV

APPLICATION OF COURT DECISIONS TO FACTS

Problems

1. Competent Parties: Facts. A young man eighteen years old rented a room from B for forty weeks, for \$3.00 a week, payable at the beginning of each week. After rooming there ten weeks he left, and B was unable to secure another roomer for the unexpired term. B sues A for \$120.00.

Ruling Case: *Gregory v. Lee*, 64 Conn. 407.

- (a) Can B recover \$90.00 from A? If so, why? If not, why not?
- (b) Can B recover \$30.00 for the ten weeks? If so, why? If not, why not?
- (c) How much, if any, can B recover? Why?
- (d) Would it have made any difference so far as B's rights are concerned, if A had left at the end of 10 weeks because he was drafted into the army? Why?
- (e) If B can recover at all, would it be better for him to sue at the end of ten weeks or wait until the end of forty weeks? Why?
- (f) Would the answer to (a), (b), (c), and (e) be the same if A had been an insane person?

2. Offer and Acceptance: Facts. A sends an offer by mail to sell certain goods at a stated price and requests B to reply by return mail. B as requested, accepts the offer by return mail, but his acceptance is never received by A.

Ruling Cases: *Vassar v. Camp*, 11 N. Y. 441; *Eliason v. Henshaw*, 4 Wheat. (U.S.) 225; *McCullock v. Eagle Ins. Co.*, 1 Pick, 278; *Lewis v. Browning*, 130 Mass. 173; *Haas v. Myers*, 111 Ill. 421.

- (a) On the above facts, is there a contract between A and B? Why?
- (b) Suppose A makes an offer by mail, and in it states that an acceptance is to be mailed, but shall not be binding until received. Is such a condition valid?
- (c) Suppose B had accepted by wire, and message had not been received, would there be a contract?
- (d) Suppose B had accepted by wire, and the message had been received, would there be a contract?

- (e) Suppose A had specified a particular place to which to send the acceptance, and B had mailed the acceptance to another place than the one specified, would there be a contract if the acceptance reached A?
- (f) Suppose B mails a letter of acceptance, and then finding that the contract is disadvantageous, telegraphs that he declines the offer, and the telegram is received before the letter, is B liable on the contract? Why?
- (g) Suppose that A makes an offer by mail to B asking prompt reply. The letter containing the offer was delayed five days. B accepts the offer the same day he receives it and sends it by return mail. In the meantime A sells the subject of his offer to C, as he is led to believe that his offer to B was not effective. Is the acceptance binding? Give reasons.

3. Mutual Consent: Facts. A offers for sale, certain land for \$1000 cash. B offers to purchase the same for \$750. A rejects B's offer. B then accepts A's offer to sell for \$1000, but A rejects B's acceptance.

Ruling Cases: *Natl. Bank v. Hall*, 101 U.S. 43; *Hyde v. Wrench*, 3 Beav. 334; *Ortman v. Weaver*, 11 Fed. Rep. 358; *Stevenson v. McLean*, L.R. 5 Q.B. Div. 346.

- (a) On the above facts, can B maintain an action against A?
- (b) Would there have been a good contract which B could have enforced if he had accepted A's original offer?
- (c) Suppose, however, B had said: "Will you take \$750?" would that have amounted to a refusal to pay \$1000?
- (d) Suppose B had accepted A's offer for \$1000 but only on condition that he pay \$500 cash and give a purchase money mortgage for the unpaid balance, would this conditional acceptance amount to a rejection of the offer?
- (e) Does any act showing that a man means to accept an offer make a binding contract?

4. Consideration: Facts. A voluntarily supplied necessities to B's father who was poor, old, and unable to work. B afterwards promised to pay A for the necessities. On that promise A sues B.

Ruling Case: *Cook v. Bradley*, 7 Conn. 57.

- (a) Is B under legal obligation to support his father? Why?
- (b) Is there any legal consideration for B's promise? Why?
- (c) Is the moral obligation sufficient to support a promise on which A can recover from B? Why?

- (d) Can A recover at all on B's promise? Why?
- (e) Can A recover on any other theory?
- (f) Would the chance to recover be different if B had merely asked A to be kind or generous enough to supply his father with necessities?
- (g) Would the case be different if B had said to A: "Supply my father with necessities and I will see that you are paid"?
- (h) Can A recover if B says to A: "Give my father necessities and if he fails to pay for them, I will do so"?

5. Subject matter must be legal: Facts. A, acting as a real estate agent in the city of B purchased certain real estate for C. The ordinance of the city of B required all real estate agents to obtain a license before a valid contract could be made, and fixed the license fee at \$25.00 per year, and provided a penalty for its violation. A had no license when he purchased the property. He brings an action for his commission.

Ruling Case: Buckley v. Humason, 50 Minn. 195.

- (a) Can he recover the commission due? Why?
- (b) If he cannot recover a brokerage fee, can he recover on the theory that he has rendered valuable services to and has enriched C? Why?
- (c) If C had actually paid A the commission for the services could C, because of A's not having a license, recover it from A? Why?
- (d) If the city ordinance had merely imposed a penalty for acting as a real estate agent without a license and had not invalidated the contract, could A have recovered the commission from C? Why?

6. Sufficiency of Consideration: Facts. A pays B \$5 in consideration for B's promise immediately to return to A \$10.

Ruling Case: Shepard v. Rhodes, 7 R. I. 490.

- (a) Do courts generally inquire into the adequacy of consideration?
- (b) Is there sufficiency of consideration in this case?
- (c) Can A recover the \$10?
- (d) Suppose A pays B \$5.00 in return for his promise to return to him \$10 after one year. Can A recover the \$10?
- (e) Suppose A of Chicago pays B \$5.00 in return for his promise to pay him \$10 in New York. Can A recover the \$10?
- (f) Suppose A pays B \$5 in consideration for B's promise immediately to return him a watch actually worth \$10. Is there sufficient consideration?

7. Sufficiency of Consideration: Facts. A, whose property is on fire, promises B, the chief of the fire department, \$1000 if he

will do all in his power to extinguish it. A also offers him another \$1000 if he will rescue a child. B, the chief of the fire department, sues A for the \$2000, who defends on the ground that his promise was without consideration.

Ruling Cases: *Reif v. Paige*, 55 Wis. 496; *Kick v. Merry*, 23 Mo. 72; *Dodge v. Stiles*, 26 Conn. 463.

- (a) Was the plaintiff as chief of the fire department already bound to do his best to save property and life?
- (b) Is there any consideration for A's first promise?
- (c) Is there any consideration for A's second promise?
- (d) Suppose the plaintiff in saving the child assumed a risk greater than he was bound to take by reason of his connection with the fire department, is he entitled to recover the \$1000?
- (e) Suppose B is a public officer and A promises him \$1000 if he will perform his official duty, is that a good consideration?
- (f) Suppose B had already been subpoenaed as a witness in a case, and A promised him \$100 if he would attend. B attends. Can he collect the \$100?

8. Past Consideration: Facts. Mr. A was nominated for office. Mr. B rendered valuable services and furnished literature to help A's cause, but without being solicited by A. After the election, Mr. A gave his note or written promise to pay to Mr. B \$60 for such campaign services.

Ruling Case: *Dearborn v. Bowman*, 3 Met. (Mass.) 155.

- (a) What is the consideration for this note?
- (b) Is the consideration present, future, or past in this case?
- (c) Does the past performance of services constitute consideration for an express promise, where the services of the promisee (B) were not performed at the express or implied request of the promisor (A)?
- (d) Does the past performance of services constitute consideration for an express promise where the services of the promisee were not performed at the express or implied request of the promisor?
- (e) Can B recover on the note? Why?
- (f) Can B recover on an implied promise? Why?
- (g) Is B then without any remedy?
- (h) Is A under a moral obligation to pay B?

9. Contracts impossible to perform: Facts. A makes a contract to repair B's building, and it is destroyed by fire.

APPLICATION OF COURT DECISIONS TO FACTS 101

Ruling Cases: *Butterfield v. Byron*, 154 Mass. 517; *Cutliff v. McArrally*, 88 Ala. 507; *Jennings v. Lyons*, 39 Wis. 553; *Clifford v. Watts* L. R. 5 C.P. 577.

- (a) Has A an action against B for being prevented from performing?
- (b) Has B an action against A for non-performance?
- (c) Would intentional destruction of the building be a defense?
- (d) If A instead of contracting to repair B's house, contracts to build the building entire, and if it is destroyed before it is completed, must he (A) rebuild it?
- (e) If a day were fixed for the completion and delivery of the building, and destruction made the completion of the building by that time impossible, would A, the contractor, be excused for non-performance?
- (f) If A after contracting to repair B's building, dies before the repairs are made, has B an action against A's executor for non-performance of the contract?
- (g) In (f), if A instead of dying, gets sick and is unable to perform, is A liable for non-performance?
- (h) Would sickness, if willingly brought on after the contract was entered into, excuse performance?
- (i) Is it competent to show that the party in default willingly assumed the risk of performance becoming impossible?
- (j) If A makes a contract to build a house on B's land, but before he starts building, the land is taken by an act of legislature and used for other purposes, has A a right of action against B?

10. Part Consideration: Facts. A owes B \$1000, which is due May 1. A pays \$800 May 2, and B in consideration of getting the money on that day, agreed to accept it in full payment. Afterwards, B sues A for the balance of \$200.

Ruling Cases: *Ayres v. C. R. I. and P. R. Co.*, 52 Iowa 478; *Jaffray v. Davis*, 124 N. Y. 164; *Riley v. Kersham*, 52 Mo. 224; *Warner v. Campbell*, 26 Ill. 282.

- (a) Is the payment of the smaller sum of money in satisfaction of the larger one a valuable consideration for the discharge of the whole debt?
- (b) Can B recover the balance of \$200?
- (c) If A pays B \$800 and two cows worth \$50 each, can A recover the remaining \$100?
- (d) If the amount of the debt A owes B is in dispute, B claiming it is \$1000 and, A claiming it is \$600, and they agree upon a settlement of \$800, which is paid and accepted as full payment, can A afterwards recover the balance of \$200?
- (e) Assume that A owes B \$1000, and the debt is due. If B promises to extend the time of payment one year, but two months after he

makes the promise to extend payment he sues A for the amount, can he recover?

- (f) If A promises to pay interest to B on the \$1000 before it is due, in consideration of B's promise to extend the time of payment one year, can B then sue before the promised extension of time has expired?

11. Statute of Frauds. Facts. A verbally sold (a) a building lot to B for \$500; (b) wild grass growing on uncultivated land to C for \$100.00; (c) growing timber, standing trees to D for \$150.00; (d) a crop of growing wheat to E for \$500.00; (e) the right to dig and carry away ore from a mine located on part of the same land to F for \$1000.00; (f) a horse to G for \$150.00; (g) a pig to H for \$15.00.

Ruling Cases: Powers v. Clarkson, 17 Kan. 218; Hirth v. Graham, 50 Ohio St. 57; Riddle v. Brown, 20 Ala. 412; Kilmer v. Howlett, 48 N. Y. 569.

- (a) Is the sale of the lot to B valid if A refuses to convey? Why?
(b) Is the sale of grass to C valid if either party refuses to comply? Why?
(c) Is the sale of standing trees to D valid? Why?
(d) Is the sale of the crop of growing wheat to E valid? Why?
(e) Is the sale to F of the right to dig and carry away ore valid? Why?
(f) Is the sale of the horse to G valid? Why?
(g) Is the sale of the pig to H valid? Why?
(h) Would it make any difference if the wild grass in (b) and the standing trees in (c) had been cut, and the ore in (e) had been dug out before the sales were made? Why?
(i) If in (g) A had sold a clock instead of a pig to H for \$75.00, would an oral contract be valid without delivery, part payment, or some memorandum in writing?

CHAPTER XVI

MISCELLANEOUS TOPICS

89. HYPOTHETICAL PROBLEMS

90. MOOT COURT CASES

91. SEARCH QUESTIONS (State Laws)

89. Hypothetical Problems. 1. A says to B, "I will sell you my horse, Prince, for \$100." B replies, "Agreed." Discuss the relationship.

2. A says to B, "I will sell you my horse, Prince, for \$100." B replies, "I will give you \$95"; or he may say, "I will give you \$105." Discuss the relationship.

3. A says to B, "I will sell you my horse, Prince, for \$100." C, a third party, says, "I will take him at that price." Discuss the relationship.

4. A says to B, "I will sell you my horse, Prince, for \$100." B replies, "Agreed, I will pay you the money to-morrow." Discuss the relationship.

5. A says to B, "I will sell you my horse, Prince, for \$100." B replies, "I will give you my note at 10 days for \$100." Discuss the relationship.

6. As in 5, B then says, "Well, I will take him for \$100." Discuss the relationship.

7. A says to B, "I will sell you my horse, Prince, for \$100, and you may consider the offer until 2 o'clock to-morrow afternoon." B replies, "Agreed." Discuss the relationship.

8. As in 7, C, knowing of A's offer to B, says to A, "I will take your horse for \$100 now." A says, "Agreed." Discuss the relationship of A, B, C.

9. A proposes as in 7, B replies, "Well, here is \$2 for your offer." Discuss the relationship.

10. As in 7, C pays the \$100 and takes possession of the horse. Discuss the relationship.

11. D writes B September 4th, "I will sell you \$1,000 bu. wheat at 50c per bushel. Reply by first mail." The letter will be delivered on the 6th. Discuss the relationship.

12. As in 11, B receives the letter on September 6th and mails acceptance, which will be delivered the 8th. Discuss the relationship.

13. Conditions as in 11 and first part 12, but the letter of acceptance is lost. Discuss the relationship.

14. Conditions as in 11 and 12, but on September 5th D writes and withdraws his offer. Letter delivered September 7th. Discuss the relationship.

15. Conditions as in 11, but on the 5th D telegraphs his withdrawal; the telegram and offer are delivered to B together. B writes and mails acceptance. Discuss the relationship.

16. Conditions as in 11 and 12, but on September 7th B telephones D that he cannot accept his offer of the 4th. Discuss the relationship.

17. A says, "I expect to get \$500 for those hogs." B says, "All right. Here is your money." A now hesitates. Has a contract been formed? Why, or why not?

18. A sells a piece of porcelain to B. B thinks it is Coldon ware, while A does not think so. Neither knows what the other thinks. Discuss the relationship of parties.

19. Again—as above, B thinks it is Coldon ware, while A knows that it is not Coldon ware and knows that B thinks it is Coldon ware. Discuss the relationship.

20. Again as above, B thinks it is Coldon ware and thinks A intends to sell it as such. A knows it is not Coldon ware, but has no knowledge that B thinks he is selling it as Coldon ware. Discuss the relationship.

21. Again as above, B thinks it is Coldon ware and also thinks that A is selling it as such. A knows these conditions. Discuss the relationship.

22. H, seventeen years of age, buys and automobile of K, an adult, for \$2,500, and gives his promissory note in payment for same. Discuss K's rights.

23. As in 21, let H sell an automobile to K and take K's note in payment. Discuss H's rights.

24. May 1, 1898, Long, of Chicago, ordered by cable a quantity of hemp from Lopez, of Manila. Lopez received the cablegram and later Long refused to accept and pay for hemp. Discuss rights of Lopez.

25. K, who has been adjudged insane, purchases from G a valuable painting for \$10,000 and gives his note in payment. Discuss the rights of the parties.

26. A, B and C are liable on a contract. Judgment for the full amount is obtained against C and he pays it. Discuss his rights.

27. E loses a bet of \$50 upon a horse race and gives his note payable to bearer in payment. The note is transferred and suit is brought upon it. Judgment for whom?

28. A enters into a contract with Alderman Blank, agreeing to pay him \$100 if he will procure the passage of a certain ordinance. Blank procures the passage of the ordinance and later sues A upon the contract. Judgment for whom?

29. S is engaged in the retail saddlery business. R buys him out and binds him by contract never again to enter that business in the United States. Within a year S starts again in the same business in the same town and R brings suit for damages. Judgment for whom?

30. Suppose, in No. 27, A has paid the \$100 to Alderman Blank and afterward seeks by suit to recover it. Judgment for whom?

31. R, an artist, out of friendship for L promises to give him a valuable painting. He later refuses to carry out his promise and L brings suit. Discuss their rights.

32. Suppose R, in No. 30, had delivered the picture and was suing for its return. Judgment for whom?

33. A buys of B a stock of goods in a warehouse located in another city and pays cash. It is learned later that the warehouse and its contents were burned before the date of the transaction. Discuss their rights.

34. L is in failing circumstances. For a nominal consideration he conveys valuable real estate to M, who has full knowledge

of his financial condition. Discuss the rights of M and the creditors of L.

35. Later, after full settlement with his creditors, L seeks to enforce an agreement between himself and M for the reconveyance of the real estate. Judgment for whom?

36. D promises to accompany E on a pleasure trip, but afterwards wilfully refuses to keep his promise. E brings suit, alleging that after D's promise he incurred certain expense of which D knew nothing. Judgment for whom?

37. X's house is about to be swept away by a flood. Y, a stranger, unrequested gives material aid in saving the household goods of X, who later agrees to pay him for his services. Can Y enforce the agreement?

38. A owes B \$500 due June 1st. On May 25th A pays B \$350 and takes B's receipt for settlement in full. Later B sues A for the difference, \$150. Judgment for whom? Suppose the same settlement had been made June 5th.

39. B, administrator of C, in conversation with A concerning a board bill due from C to A, stated that he would see it paid. Is B bound by this promise? 4 Jones (N.C.) 196.

40. E owes F \$50. H, a friend of E, promises to pay the debt. He fails to do so and F sues. Can he recover? Suppose H had written a letter to F stating that he would pay E's debt.

41. T, being about to marry M, orally agrees to release and renounce all interest in her intended husband's estate after his death. Is she bound by her agreement? 120 Ill. 26.

42. D orally agrees to sell his farm to E for \$8,000. E later tenders the money and demands a deed. D refuses to carry out the agreement. Can E enforce it?

43. In October F agrees verbally to lease his farm to G for one year to commence March 1st. F on March 1st refuses possession. What are G's rights? 19 Ill. 576.

44. A, the heir of B, is left nothing by his father's will and threatens to contest it. C, the executor, promises to pay him \$5,000 if he will let the will stand. Can A enforce this agreement? Will it make any difference whether this agreement is in writing or not?

• 45. G says to H, "I will give you \$1,000 for your automobile."

H replies that he will take \$1,200 and if G wishes will give him two days in which to accept. G assents to this. On the day following H sells to K. G consults you—how will you advise him?

46. A was guardian of B, who has just attained her majority. Since reaching full age she has sold valuable property to A for much less than its full value, being ignorant as to the same. Discuss B's rights.

47. S, under threats of prosecution against her son for a felony, is induced to convey to T valuable real estate. She comes to you for advice. Discuss her rights.

48. A sells B a horse to be delivered on June 1st for \$100. On May 3d, still having the horse in his possession, A sues B for the money. Discuss their rights.

49. D contracted with F, an artist, to make a portrait of him. F died before executing the contract. What are D's rights? Suppose the contract had been for the purchase of a farm.

50. A Co. agree to furnish B Co. certain structural iron in 60 days. Employes of A Co. strike and it is unable to fulfill its agreement. Is this a good defense to B Co.'s suit for non-performance?

51. L agrees to deliver M 1,000 cords of wood, 100 cords a month to be delivered for ten months. The first month he delivered 80 cords, the second month 60 cords, and the third month 70 cords. M then refuses to accept any more wood and L sues for breach of contract. Discuss their rights.

52. A claims B owes him \$600. B denies the amount, but admits he owes A about \$400. Finally, after comparing claims, they agree to call the amount settled by B's paying A \$450. Discuss the relationship.

53. After agreement as in 51, A sues B for the full amount he claims, \$600. He is able to prove this account. Discuss the relationship.

54. As in 51, but B pays the \$450. A afterwards attempts to collect the remainder, \$150. Discuss the relationship.

55. A buys property from B for \$5,000, but before payment in full is made it appears that B has damaged this property to the extent of \$1,000. Discuss the relationship.

56. A owes B \$100 and tenders him in payment 25 pennies.

dimes and quarters \$9.75, and 90 silver dollars. B refuses to accept, claiming it is too inconvenient for him to carry. Later he sues A for the account, \$100. Discuss the relationship.

57. Same as in 55, but the \$90 is in National bank currency. Discuss the relationship.

58. A owes B an open account of \$500 due July 1, 1906. On September 1, 1908, A leaves the State and is absent five years. On October 1, 1913, B enters suit for the claim and interest. A's defense is statute of limitations. Judgment for whom and for what amount?

59. A buys 50 bushels of special seed wheat from B at \$5 per bushel. He sows this on 25 acres of land for which the rental value is \$7 per acre. The seed is worthless. It is estimated that the ground lying fallow for the season is a benefit of \$2 per acre. Labor paid for plowing, harrowing, and seeding amounts to \$55. Judgment for how much?

90. MOOT COURT CASES

NOTE. It is suggested that the following cases be used for moot court trials. One or two students should be directed to prepare and argue the case for the plaintiff, and the same number appointed for the defense. The balance of the class may act as a jury with the teacher as a sitting magistrate. If a jury is used, the facts as stated will be considered as proved. The attorneys will argue the law as to the facts and the jury will then bring in a verdict. If erroneous, the court may set aside the finding. The case may, however, be tried as on appeal. Then a bench of three judges may try the cases. The teacher, if desirable, may act as chief justice of the court.

1. *Action*: This is an action for debt.

Facts: Mr. B purchased from time to time from Scott & Co., merchants, and made payments of various amounts and on January 1, 1900, the balance due was \$325.50. Statements were regularly sent to Mr. B, but he paid no attention to them. On July 1, 1901, one of Mr. B's cows, valued at \$50.00, strayed onto the property, to wit: a pasture where Scott & Co. kept their extra delivery horses. Scott & Co. kept the cow and sent Mr. B a receipt for \$50.00 to apply on account. To this Mr. B objected, but took no means to recover his cow. On December 15, 1905, Mr. B moved out of the State and returned on July 3, 1907.

Efforts were made to collect the debt, but to no avail. On August 4, 1913, a collector called and after the usual dunning remarks, banteringly said to Mr. B, "You should pay the account; you got the goods, didn't you?" "Oh, yes," replied Mr. B, "but the debt is outlawed and I do not propose to pay it." At this a commotion was heard and a dog belonging to Mr. B came tearing past, trying to catch one of his neighbor's chickens. Mr. B started after the dog, saying, "I'll have to get rid of that dog or pay damages some day." The collector for Scott & Co. jokingly said, "Give him to me on account." Mr. G, glad to so easily rid himself of the dog, said, "He's yours." The collector gave Mr. B a receipt on account for the dog, valued at \$25.00. He took the dog away with him. Scott & Co. brought suit for \$250.50 and interest at the legal rate.

Issue: Can Scott & Co. maintain a successful action on the above facts?

91. SEARCH QUESTIONS (STATE LAWS)

What does your State statute say about seals and contracts?

What are the contractual limitations placed on minors, married women and aliens? May aliens hold real estate?

What do the statutes say, if anything, about wagering contracts?

What do they say about contracts made on Sunday?

Is there any distinction between joint contracts, and joint and several contracts?

Do you find any provisions regarding the Statute of Frauds? What are they?

Compare what you find with the several sections mentioned in this text. Are any omitted, and, if so, which ones?

If any section is omitted, how may contracts relating to this section be formed?

What is the term of the statute of limitations: for open or book accounts? for contracts in writing? for judgments?

What limitations are placed on the power of garnishment?

What is the legal rate of interest? The contract rate? The penalty for usury?

Is there a pure food law? What is the substance of it?

Is there a workmen's compensation law?

What effect on recovery of damages has contributory negligence on the part of the employee?

Is there a child labor law and what is its substance?

Is there a law regulating the number of hours per day women may be employed? Is there a minimum wage?

What is the scope of mechanic's lien? May it be waived? How?



NAPOLEON BONAPARTE (1769-1821)

While Napoleon is chiefly known in history as one of the world's greatest military geniuses, he exercised his master mind with financial, political, and legal questions. The great reconstruction period in French history dates from the Consulate rather than from the Revolution. Following the Treaty of Amiens, Napoleon devoted himself to reconstruction work: (a) the restoration of the Church, (b) the University, (c) the judicial system, (d) the codification of all the laws, (e) the bank of France, (f) the Legion of Honor.

While under arrest in 1794 he studied the civil law and on his release said, "I was saturated with Justinian and the decisions of the Roman legislators." As a result of his activities, the herculean task of codifying the laws was completed.

The *Code Napoleon* is known to all civilized nations of the earth.

CHAPTER XVII

AGENCY

- 92. INTRODUCTION
- 93. NECESSITY
- 94. DEFINITION
- 95. NATURE OF CONTRACT
- 96. WHO MAY ACT
- 97. DISTINCTION BETWEEN AGENT AND SERVANT
 - 1. Vice Principal
 - 2. Independent Contractor
- 98. CLASSES OF AGENTS
- 99. FORMATION OF CONTRACT
 - 1. By Agreement
 - 2. By Implication
 - 3. Authority
 - 4. Ratification
- 100. DELEGATING AUTHORITY
- 101. JOINT AGENTS
- 102. JOINT PRINCIPALS
- 103. FORM OF CONTRACT
- 104. QUESTIONS ON TEXT

92. Introduction. In the subject just completed was included a general consideration of the nature, requisites, validity, interpretation, operation and enforcement of contracts, oral and written, and the persons or classes of persons, natural or artificial, having contractual powers and capable of assuming contractual duties, but without special reference to particular classes of contracts or in respect to particular kinds of property. The chief aim

was to fix firmly the fundamental principles which underlie all contractual relations, the special application being left for subsequent classification and treatment.

93. Necessity. The needs and the magnitude of business are such that the business man cannot personally supervise and make all the agreements and obligations necessary to conduct a large and widely scattered business. Consequently, he appoints others called agents to do his bidding. For example, a great business concern like the U. S. Steel with its billion dollar capital is operated and directed by agents. The officers and directors are all agents. The business is owned by over a hundred and fifty thousand stockholders throughout the world. All our governmental officers from the President of the United States down to a village constable are agents and servants, "we the people" are the stockholders.

94. Definition. An agent is one vested with authority to bring about a contractual relationship between his principal and a third person. The idea of agency necessitates the relationship of three parties: the principal who gives authority, the agent who accepts and acts under and through this authority, and the third person whose willingness to do business with the agent brings about a contract which, while made with the agent, binds the third party and the principal. The authority of the agent may be delegated by the principal or by the operation of law. The authority for performance may be given subsequently to the act. Subsequent ratification is equivalent to prior authority when it confirms a demand against the one ratifying.

95. Nature of Contract. The law of agency rests on the maxims "He who acts through another acts in person" and "He who has authority to act has power to appoint another to act in his stead."

The fundamental elements of contracts form the foundation of agency. The contract formed by the agent must submit to the same analysis as though made by the principal. Agency is a means to an end. The agency is the instrument through which the various details of business are consummated.

96. Who May Act. We will deal first with the competency of the principal, and second with the ability of the agent to follow intelligently the instructions of the principal. No principal can enter into a contract through an agent that he himself could not make. An agent need not be competent to make a binding contract for himself, but must be sufficiently intelligent to form contracts in accordance with the powers delegated to him by his principal. A minor, while not being able to make a personal contract, may be competent to make contracts for another.

97. Distinction Between Agent and Servant. Not all who act for another are to be classed as agents. The chief distinction between an agent and a servant is in the nature of the act performed. The agent brings about a relationship between his principal and a third person that results in a contract, while the servant has no such rights or powers conferred on him. One makes a contract, the other performs some act. One person may be both a servant and an agent. A captain of a vessel as such is a servant, but coupled with this appointment is authority to hire a crew or pledge for credit. He would be an agent while performing the latter. For example, the motorman on a street car is a servant, while the conductor is an agent. The company in each case is liable in damages for an improper performance of duty as, if the driver through carelessness, injures a person, or the conductor demands and collects excessive fare, or ejects a passenger who is rightfully on the car.

Briefly, in a question of an agent there are three persons involved, while in a question of a servant there are but two persons involved.

1. Vice-Principal. The vice-principal doctrine is an evolution of the times, in that the master is liable for an injury to a servant through his own negligence. Therefore, he is liable for an injury to one servant caused by the negligence of another servant to whom the master has given the power of supervision and direction. This brings about classes of servants or laborers. The one who has supervision and direction which he cannot assign is a vice-principal. "The implied obligation of the servant to assume all risks incident to the employment, including that of injury occasioned by the negligence of a fellow-servant, has no application

where the servant by whose negligent conduct or act the injury is inflicted, sustains the relation of a superior in authority to the one receiving the injury. . . . Where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury."

2. *Independent Contractor.* Another relationship that is somewhat confusing, as it seems to involve the peculiarities of both agent and servant, is the "independent contractor." Such a person seems to act as a servant and as an agent; but legally he is outside the scope of either, as, A enters into a contract with B to build him a house according to specifications. The latter, in carrying out his agreement, hires labor and buys material. B is an independent contractor. Had A decided to take charge of the work himself, there would have been agents and servants involved. "If the person employed is one who undertakes to produce a given result, but is free to select the means and methods of accomplishment, in things not specified beforehand, and the employer does not retain the right to order and control the manner in which the work shall be done, the person employed is an 'independent contractor,' for whose wrongful acts, neglects, and defaults, the employer is not liable."

98. Classes of Agents. While authors generally classify agents as general and special, there is practically nothing to be gained by this classification, as in each case the authority must come from the principal either by delegation or by operation of law. A person who consummates contractual relationship between a principal and a third party is an agent pure and simple. "No man is at liberty to send another into the market to buy and sell for him, as his agent, with secret instructions as to the manner in which he shall execute his agency which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from these instructions, say that he was a special agent, that the instructions were limitations upon his authority, and that those with whom he dealt, in the matter of his agency, acted

at their peril because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge." The doctrine as above quoted recognizes no such classification as special and general agents. However, it does not follow that the third party may contract with a supposed agent and hold the principal liable because he says that he is an agent and has power to act. The third party must act in good faith and where possible he must satisfy himself of the existence of the agency.

99. Formation of Contract. The elements of parties, subject matter, consideration, agreement, time, and form need no discussion at this time or place. They have been fully discussed under the subject of contract. Our aim and investigation will bear entirely on the new element introduced—the agent—and the new relationship thereby raised,

1. *By Agreement.* The greater number of agents are appointed as the result of an agreement between two persons, whereby one agrees to appoint and the other to accept such appointment and act for the other. For example, all the clerks in a store or bank are employed through agreement.

2. *By Implication.* If the party acting or holding himself out as the agent of another transacts business for the supposed principal in such a way that the public is led to believe an agency exists, and the principal knows this to be so, the law implies an agency to exist. This is for the protection of the public. If such conditions exist with the knowledge of the principal and he does not wish to be bound, it is his duty to object and thereby prevent third parties from entering into the agreement.

3. *Authority.* The right to appoint an agent to perform for one depends upon the power to form a contract. Where individual authority to make a contract exists there also is found appointing power. The principal must possess contractual ability; the agent, the ability faithfully to follow instructions. (See Case No. 31.)

4. *Ratification.* If the representation of agency is made when in fact no agency exists, and contractual relationship is made with a third party, the agreement may be ratified by the prin-

principal and the benefits of the contract will inure to the profit of the principal, a subsequent ratification being equivalent to the giving of prior authority. The weight of authority is that such ratification does not bind the third party. He has a right to object to the contract, as he has a right to do business with one having authority. The ratification of the principal irrevocably binds him, and the contract is complete unless the third party refuses to be bound.

The agent is bound to follow instructions, but if he exceeds his authority and the principal ratifies the act, the agent's power to act is thereby enlarged so far as the third party is concerned. A appoints B to buy grain for him, giving him the usual authority to do so. A buys and ships grain and B is generally recognized as A's agent. A instructs B not to buy wheat during certain months. B nevertheless buys wheat. A is bound, as the third party has no knowledge of the instructions. Again the party knows of the instructions to the agent, notwithstanding he sells wheat to A through his agent, B, which contract is ratified by the principal. Other similar contracts may now be made with the agent and be enforced, although the agent has no right to make the contract.

100. Delegating Authority. As a general rule an agent is appointed to do a particular act or acts, generally relating to a certain business, the performance being essential and not a means through which it is to be accomplished. Therefore, it follows that the agent may appoint assistants. If, however, the appointment is of a personal nature in which the individuality of the agent is considered, the authority cannot be delegated to another.

"An agent cannot delegate any portion of his power requiring the exercise of discretion or judgment, otherwise, however, as to powers and duties merely mechanical in their nature."

101. Joint Agents. As to whether an agency is joint or joint and several is a question of construction. If the former, the agents must act jointly; if the latter, they may act jointly or severally.

102. Joint Principals. When there are several principals not legally related, as in a partnership, the agent or agents must have the express or implied authority of each principal to the appointment in order to make contracts that bind the principals. All non-incorporated or non-partnership associations, as certain clubs, societies, etc., fall in this class. Not even a majority vote will join minority members in a liability unless they by acquiescence ratify the control of the majority.

103. Form of Contract. The general law of contracts is applicable, the majority of contracts may be made orally by an agent. If, however, the law directs that certain contracts or evidence thereof must be in writing, then the agent must comply. The Statute of Frauds is an example. (See page 47.) If the agent is to make a contract that is to be signed, sealed and delivered, his appointment as an agent must be in writing, signed and sealed, and is generally known as a power of attorney. (See Form, page 320.)

104. QUESTIONS ON TEXT

Define agency. Why necessary? Who may act as a principal and appoint an agent? Who may act as an agent? May one act as agent who could not act as principal? Give reason.

What is the nature of the contract? Distinguish between agent and servant. Name the classes of agents. Is this distinction essential? How may the contract of agency be formed? What is an "independent contractor"?

Explain "Subsequent ratification is equivalent to prior authority." Point out the difference between the power and the right of an agent to act. What limitation is there to be placed on agents' authority to delegate power? When is an agency joint and when joint and several? What is the rule in regard to the form of the contract between agent and principal?

What is the scope of the authority of voluntary associations?

CHAPTER XVIII

RELATIONS OF AGENT AND PRINCIPAL

105. INTRODUCTION

106. NATURE OF CONTRACT BETWEEN AGENT AND PRINCIPAL

1. Duty of Principal
2. Duty of Agent
3. Compensation
4. Lien
5. Instructions
6. Skill
7. Accounting

107. NATURE OF CONTRACT BETWEEN PRINCIPAL AND THIRD PARTY

1. Authorized Contract
2. Unauthorized Contract
3. Scope of Authority
4. Torts of Agents
5. Notice
6. Liability of Third Party

108. NATURE OF RELATIONSHIP BETWEEN AGENT AND THIRD PARTY

1. When Agent Is Bound
 - (a) Real and Apparent Authority
 - (b) Representation as Principal
 - (c) Assumes Risk
 - (d) Incompetent Principal
 - (e) Under Seal
2. When Neither Party Is Bound
 - (a) Death
 - (b) Assumes Risk
 - (c) War
 - (d) Public Agents

109. QUESTIONS ON TEXT

105. Introduction. The chief phases of the subject to be considered in this chapter are, the obligations of the principal toward the agent and the obligation of the agent toward the principal.

106. Nature of Contract Between Agent and Principal. The relation between the agent and principal is wholly dependent upon the contract existing between them. The chief duty of each is to carry out this agreement in all its details.

1. *Duty of Principal.* The principal's chief duty is to pay the agent the agreed compensation as per contract.

2. *Duty of Agent.* The duties of the agent to the principal are also dependent upon the agreement and may be enumerated as, (1) loyalty to principal; (2) the use of ordinary care and skill in performance of duties; (3) subordination of personal interests to those of his principal. If instructed to buy for the principal the agent cannot sell his own goods. He cannot act as buying agent for one principal and selling agent for another. He cannot faithfully serve two masters. (See Case No. 32.)

3. *Compensation.* The contract existing between the two parties should settle the question of consideration for the agency. In the absence of express agreement resort must be had to custom or the usages of trade. If it can be shown that the agent was requested to perform, or the performance was with the knowledge of the principal, the agent is entitled to reasonable compensation. In determining the question of compensation the reasonableness of the contention for or against compensation must be shown.

Where one acts as agent for two parties with their knowledge, he is entitled to compensation from each; as, where A was appointed selling agent for B and buying agent for C and brings about a contract between the two, each must pay for his services. However, in this case his relationship is more that of an intermediary than of an agent. Brokers are so classed. If the services are of an illegal nature no compensation may be recovered by the agent. (See Case No. 33.)

4. *Lien.* An agent is entitled to be reimbursed for expenses incident to the agency. If an agent has a right to compensation, reimbursement or indemnity, it must necessarily follow that some method is given him of enforcing his right. The principal method is a right of lien. This is a possessory right and is lost when possession of the goods passes to the principal. Briefly, a lien is a right to hold goods belonging to another until some claim incurred in their behalf has been paid. The subject of lien will

be more fully discussed elsewhere. There are two classes of liens, special and general. The former is the right to retain the goods of another until charges relating to those particular goods have been paid; the latter is the right to retain the goods until a general balance has been paid.

5. *Instructions.* The relationship of agent and principal is of such a confidential nature that the law is very strict in holding the agent bound to follow instructions. It is no defense for him to say that he exercised great care and forethought in transacting the business. The question is, did he follow instructions? If he had special instructions he is liable for all losses that may arise if he does not follow them. A landlord gives his agent instructions not to deliver a lease until certain arrearages have been paid. Suppose the agent delivers the lease upon receipt of a check and the check proves worthless. The agent is liable for the loss. Any deviation from instructions is at the risk of the agent. The utmost good faith is exacted of all agents.

6. *Skill.* The agent is bound to use ordinary skill, care and diligence in the prosecution of the agency. The nature of the business determines the measure of skill. Thus an agent to buy land must possess the skill usually found among such agents, while one to purchase machinery should be a skilled mechanic. However, a determining element is the knowledge the principal possesses of the character and ability of the one he appoints to act for him. (See Case No. 1.)

7. *Accounting.* The agent must conduct the affairs of his principal in such a way that a true and correct statement may be rendered at regular intervals, or within a reasonable time after demand. If the accounts are so carelessly kept that what belongs to the agent is hopelessly mixed with that of the principal, then it all belongs to the principal. All profits that result from the agency contract, as the accumulation of interest, belong to the principal. If an agent instructed to sell wheat to-day disregards instructions and holds until to-morrow, when he secures a higher price, the advantage belongs to the principal. If, however, the price has diminished, the loss would fall on the agent.

If the agent has a claim against his principal which would ordinarily result in a set-off or a counter-claim, he may not exercise

it if by doing so it would defeat the agency. A instructs his agent, B, to collect certain rents, deduct his commission and apply the balance to a claim owing C. Here, although B may have a valid claim against A, he will not be allowed to set it up against A. It would defeat the agency. The agent's duty to be loyal to the principal prevents him from denying the title of the principal. If as a result of the agency he comes into possession of property belonging to the principal, he is not allowed to deny title in the principal even though the transaction had been illegal or the proceeds are to be used for an illegal purpose.

107. Nature of Contract Between Principal and Third Party.

The object of the contract of agency is to bring about the relationship of contract between the principal and a third party. The agent by faithfully following instructions and acting within the scope of the business, brings about the desired end. In this case there is little difficulty in determining the rights and liabilities of the chief parties. It is when the agent has but apparent authority and has exceeded his instructions, or is not clearly within the scope of the business, that difficulty arises. Everyone has a right to have the one with whom he contracts carry out those contracts; consequently the intention is to enforce agreements against the principal. He is supposed to be the responsible party legally and financially.

1. *Authorized Contract.* Where the principal has authorized a particular contract there is no uncertainty in reference to parties, authority, or scope of business. In such case the contract made by the agent binds both principal and third party. The rule, however, seems to be in some jurisdictions that the third party may withdraw from the agreement if the withdrawal is made before the principal acts on it. (See Case No. 34.)

2. *Unauthorized Contract.* Granted that an agency exists for the purpose of making contracts, still the agent may disregard instructions given at the time of the appointment or subsequently. Now, the agent having formed a contract of this character, the question arises, Shall the principal be bound? Clearly here is a contract that he did not authorize or intend to enter into. So far it does not appear to justify the liability of the principal.

The true solution can only be arrived at, however, from the viewpoint of the third party, the general public. A wrong has been done; who should suffer, the principal or the third party? Clearly the one who caused or made it possible to form the contract. The agent was selected and appointed by the principal. He should exercise care and discretion in delegating contractual powers to another. The third party dealing with the agent is justified in believing that the agent has some authority, such authority as is necessary, and also implied authority, to complete the agency successfully. *The third party must use ordinary care in ascertaining the authority of the agent.* Having done so, the principal is bound.

3. *Scope of Authority.* The foundation of the agent's authority is his appointment. Express authority is that actually given by the appointing power; implied authority, that which is an incident. In other words, it is that which naturally and reasonably grows out of express authority. It is the additional and relative authority that must be assured in order to consummate the agency fully. Apparent authority is that which one would naturally suppose to exist from the acts of principal and agent. If no authority exists in a restricted form, usage of trade may give the agent additional authority to act. This does not, however, modify or change express authority.

4. *Torts of Agents.* A tort is a wrong for which the law gives a remedy in damages. A principal is liable for his own torts. He should be liable for all torts brought about through the instrumentality of an agent.

"This rule of liability is not based upon any presumed authority in the agent to do the acts, but on the ground of public policy and that it is more reasonable when one of two innocent persons must suffer from the wrongful act of a third person that the principal, who has placed the agent in a position of trust and confidence, should suffer than a stranger." (See Case No. 35.)

5. *Notice.* Notice to an agent (while engaged in the business of the agency) is notice to the principal.

"The rule that notice to the agent is constructive notice to the principal is based on the presumption that the agent has communicated to the principal the facts connected with the subject matter of his agency, which came to notice."

There is considerable confusion in the decisions as to whether notice acquired by an agent outside of the business of the agency is notice to the principal.

6. *Liability of Third Party.* The relationship of third party to the principal is the same as in a contract in which the agent is eliminated. He accepts and does business with the agent as a medium.

108. Nature of Relationship Between Agent and Third Party.

The authority vested in the agent enables him to bring about contractual relations between his principal and the third party. The agency is created for this purpose, and if the agent has followed instructions and is clearly within the scope of the business he assumes no liability. He has formed an authorized contract.

However, there are several ways in which an agent may become personally liable.

1. *When Agent Is Bound.* (a) *Real and Apparent Authority.* If an agent exceeds both real and apparent authority, he has formed an unauthorized contract. Should the principal subsequently ratify the act of the agent, the principal's liability would be added to that of the agent. The ratification by the principal would release the agent from any damages that might arise. The third party would doubtless have the right to reject the contract or hold either party to the agreement.

(b) *Representation as Principal.* If the agent holds himself out as the principal, the third party may object to doing business with the principal, and this may be the reason for the withholding knowledge of the agency agreement. The benefit of the contract belongs to the principal. If the principal is revealed, the third party has the right of election as to the party he will hold liable.

(c) *Assumes Risk.* When the agent assumes the responsibility of the contract, and in order to secure the contract, specially offers to make the principal's responsibility his responsibility, then the agent is liable. This is nothing more than the old rule that one must live up to his contracts.

(d) *Incompetent Principal.* When a person offers to do business as the agent of another, he not only represents that he

has authority to act, but his principal has power and authority to create such agency; otherwise the agent becomes liable for all damages. The third party must show that he has suffered damages caused by the disaffirmance of the incompetent principal.

(e) *Under Seal*. If the agent enters into a specialty contract using his own name in the agreement, he is liable whether the principal be known or unknown.

2. *When Neither Party Is Bound*. (a) *Death*. The death of the principal works a revocation of the agency, and a contract formed after that event is a mere nullity.

(b) *Assumes Risk*. If the agent discloses all the authority to the third party, and this authority is insufficient, a contract formed as a result of this will not be effective. The principal did not authorize it nor did the agent warrant his authority. The risk is with the third party, as he is the judge of the sufficiency.

(c) *War*. The beginning of hostilities between the respective countries of the parties suspends all contractual relations between such parties.

(d) *Public Agents*. All officers of cities, states, and the general government are agents of such principals. Their contractual powers are clearly indicated and limited. The public is held to have knowledge of these rights and duties. Such agents assume no personal liability in the contracts that they enter into in behalf of their respective principals, even though they exceed their authority. Where authority is exceeded no contract results.

109. QUESTIONS ON TEXT

What is the relationship between agent and principal? Discuss the duties of each. What is the rule as to compensation and outlays made by the agent?

What is a lien? What is the rule relating to instruction? Discuss skill of an agent.

What do you understand by saying that an agent must make an accounting? What is the nature of the contract between the principal and the third party?

Explain how principal may be bound when agent exceeds authority. What is the scope of the agent's authority? What is the rule in regard to an agent's torts? What is the rule of notice? What are the duties of public agents?

What is the relationship of third party to principal? What is the nature of the relationship between the agent and the third party? When is the agent bound? When is neither party bound? State the rule in regard to the liability of public agents.

CHAPTER XIX

TERMINATION OF AGENCY

110. INTRODUCTION

111. REVOCATION

112. NOTICE

113. LIABILITIES

1. Coupled with an Interest

114. REMUNERATION

115. BY OPERATION OF LAW

1. Death

2. Insanity

3. Bankruptcy

4. Destruction of Subject Matter

5. Marriage

6. War

116. CAUTION

117. POWER OF ATTORNEY

118. ADDITIONAL INFORMATION

119. QUESTIONS ON TEXT

110. Introduction. Mutuality is a predominating factor in the formation of the agency contract. The needs of business created the necessity. The contract affects but the agent and principal, and since this contract is formed as a result of an offer and an acceptance it may be cancelled by a like process.

If the agency is for a single act, or a certain time, the accomplishing of the act or the expiration of the time works a dissolution of the agency so far as the parties are concerned.

111. Revocation. The contract of agency is of a confidential

nature, and since the principal has conferred the authority on the agent he should have the power to annul the appointment. This is true even though there may be an agreement to the contrary but this does not deny liability for breach of contract. The principal has the power to sever, at all times, the relationship although he may not have the right.

The agent's authority to act may be revoked by express statement to that effect, or it may be by implication where the principal acts in such a way that it is impossible for the agent to act, as when an agent is appointed to rent certain property belonging to the principal, who sells same before the agent can act.

112. Notice. So far as the principal and agent are concerned, the notice of revocation to the agent, either express or implied, terminates the agency, but in order to protect himself fully the principal is obliged to give notice to all third parties with whom the agent has transacted business or who have knowledge of the appointment. If the third party received actual notice, it would be sufficient. If he has information that would be investigated by a person of ordinary caution, and does investigate and thereby receives notice, it is sufficient. Notice is generally effected by a written communication being mailed to all customers who have had dealings with the agent and a notice by publication to all others.

113. Liabilities. While, undoubtedly, the principal has the power to discharge, he is bound to respect the contract with the agent or be held in damages.

1. *Coupled With an Interest.* An agent who possesses an interest in the agency cannot be discharged by the act of the principal. This must not be confounded with a percentage of profit that the agent may receive as the result of the agency contract, which is not sufficient to prevent his discharge. An agent is appointed to sell certain property, deduct commissions, and place the proceeds to the credit of the principal on a debt due the agent. This agency creates an interest which cannot be terminated by the principal.

114. Remuneration. If one party has the right or power to terminate a contract, certainly equity and justice demand the same right for the other party. This is generally so. The remuneration may be by express agreement or may arise by implication. The principal in order to protect himself from subsequent acts of the agent must notify third parties.

If an agency is for an indeterminable period the agent has the power and right to terminate the contract at any time. If, however, the agency is to endure for a definite period, the remuneration may be by express agreement or may arise by implication.

If the contract is for personal service of extraordinary skill and ability the agent may be enjoined from using his services elsewhere.

115. By Operation of Law. The relationship of agency may be terminated by operation of law in several ways, namely: death, insanity, bankruptcy, destruction of subject matter, marriage, war.

1. *Death.* The death of either party terminates the agency at that moment. Contracts made by an agent after the death of a principal, even though the death may not be known to either agent or third party, are of no force.

2. *Insanity.* Voidability is a consequence of a contract relationship wherein one party to the contract is insane. If the principal is insane, valid authority cannot be given; if the agent is insane, a termination of the agency results, as the agent does not possess the ability to follow instructions. Yet if the contract is executed and there is no fraud and no knowledge of insanity the contract will be allowed to stand.

3. *Bankruptcy.* In case of bankruptcy of the principal his property is taken from him, his title vesting in a trustee for the benefit of his creditors.

4. *Destruction of Subject Matter.* If the subject matter of the agency should be destroyed, there is no reason for the continuance of the agency. If an agent is appointed to perform a certain act, as the selling of a horse, and the horse dies, or of a building, which is destroyed by fire, the agency terminates. If two agents are appointed to sell the same piece of property the sale by one dissolves the other contract of agency.

5. *Marriage.* The marriage of a female at common law would work a dissolution of an agency, as, if a principal, her property would be under certain control by another, her husband.

6. *War.* If the agent and principal are subjects of different countries, a state of war would suspend the contract of agency, at least during hostilities.

116. Caution. Agents, if they wish to escape personal liability, should transact business in the name of the principal, follow all instructions, and sign all contracts showing they are not principals but agents. It has been held generally, that where an agent signs his name to a contract and then adds, "Agent of such a person or firm," he is personally liable and that the added terms are mere description distinguishing him from some one else perhaps of the same name. (See Case No. 36.)

NOTE. Some jurisdictions distinguish between the use of descriptive terms as "agent for" and "agent of," holding the former as binding and the latter as descriptive of the individual. To settle all disputes the signatures should be as follows:

THE RIDGWAY ICE COMPANY

By W. H. White, Pres.

By A. B. James, Treas.

117. Power of Attorney. This is the creation of an agency for a specific act or a specific purpose wherein the agent is to form and execute written contracts that must be made under seal. Any agent, with oral authority and proper instructions, may make and execute written contracts for his principal that are not to be under seal, such as signing the principal's name to written agreements to satisfy the statute of frauds. Thus an agent may execute the written agreement for the sale or purchase of real estate, but if the agent is to follow up the written agreement with deeds and mortgages, formal power is required of an equal standing with these documents that are necessary to the complete transfer of the property. Such authority is recorded with the deeds and other instruments to the transfer. (See form on page 320.)

118. Additional Information. The common law looked with disfavor on the assessing of damages from the employer in favor of one servant that was injured by the acts of another servant. Formerly the employer had but few servants, the term servant being used synonymously with workman. Today, employers number their employees by the hundreds and thousands. Business activities are looked upon from the standpoint of the public benefit. Therefore, the public should share in the cost of operating the production machinery of today. This is accomplished by remedial legislation wherein the employer is held liable in damages that are incidental to the business, and these charges are considered a part of the cost of production which is the basis of the cost of the goods to the consumers.

The Uniform Workmen's Compensation Act was formulated in 1914 and was recommended to the states for adoption. It is a compulsory act. It has been adopted in a modified form in several of the states. *All of the states have legislation along this line, and every employer should know his liability relative to employees.* This can only be determined by knowing the particular *state law*. The law does not apply to farming and domestic servants or employees.

From the U. W. C. A.: This Act shall apply to all public and all industrial employment. If a workman receives personal injury by accident arising out of and in the course of such employment, his employer or the insurance company shall pay compensation in the amounts and to the person or persons hereinafter specified by statute law.

No compensation shall be allowed for an injury caused (1) by the employee's wilful intention to injure himself or to injure another, or (2) by his intoxication. If the employer claims an exemption or forfeiture under this section, the burden of proof shall be upon him.

These laws have the effect of denying the common law defense known as *fellow servant doctrine*, *assumption of risk* and *contributory negligence*. (See Glossary.) These laws have given rise to a new line of insurance known as Workmen's Compensation Insurance. (See Cases No. 37a-b-c.)

119. QUESTIONS ON TEXT

What is the principal's authority of revocation? Limitation? Explain notice necessary to terminate the agency. Explain rule in reference to liability of principal in case of revocation.

What is the agent's power as to renunciation? What liability may follow? In what other ways may the agency be terminated?

How should an agent sign a contract? Why?

What is the Workmen's Compensation act? How does it affect the common law? What three changes are brought about?

CHAPTER XX

APPLICATION OF COURT DECISIONS TO FACTS

Agency

1. Facts: A engages B as his agent to travel and sell goods for him, the goods being in the possession of B. A forbids B to receive payment for the goods he sells and also to hire a horse or auto on the credit of A while traveling about on A's business, as he has furnished B with money for that purpose. B, while traveling about on A's business, hires a horse or auto on the credit of A, receives payment for the goods he sells, and absconds with the money.

Ruling Cases: *Huntly v. Mathias et al.*, 90 N. C. 101; *Higgins v. Moore*, 34 N. Y. 417.

- (a) On the above facts, is B a general agent or a special agent?
- (b) As to third persons, is the power to travel and sell goods general or special?
- (c) If, as to third persons, the power conferred is general, does it carry with it the incidental power to contract for the means necessary to accomplish the purpose of the agency?
- (d) Can A, as to third persons, by secret instructions to B, limit B's authority and avoid liability if B disobeys?
- (e) Is A liable for the hire of the horse?
- (f) Since B has possession of the goods with authority to sell them, has he implied authority to receive payment for the goods he sells?
- (g) If B had not had possession of the goods which he was authorized to sell and deliver, would he have had implied authority to receive payment for the goods sold?
- (h) Can A recover again from the buyer the price of the goods sold and delivered?
- (i) Would the case be different if the buyer had known A's instructions?
- (j) If B, in making agreements of purchase, had used printed order and sales sheets with a statement printed on them, "Agents are not permitted to accept payment for principal," what effect would it have had?

2. Facts: Without authority A sold and delivered to B a load of coal belonging to C. While unloading the coal he carelessly broke B's window.

Ruling Cases: *Dempsey v. Chambers*, 154 Mass. 330; *Heath v. Nutter*, 50 Me. 378.

- (a) On the above facts, is C liable for the broken window?
- (b) On the above facts, is A liable for the broken window?
- (c) On the above facts, is A liable to C for selling and delivering C's coal without authority?
- (d) If C in express words ratifies A's act, is he (C) liable for the broken window?
- (e) If C merely sends a bill to B for the coal, does this make C liable to B for the broken window?
- (f) If C, due to the negligence of A, must pay B for the broken window, has C a right of action against A?
- (g) Do you think it advisable that C pay for the broken window at once, or wait until he is sued? Why?
- (h) Suppose A without authority had conveyed C's land to B and C had received the purchase price, would this be a ratification?

3. Facts: A owed B a debt and he pledges certain goods to him as security for the debt and gives him power to sell the goods upon default.

Ruling Cases: *Roland, administrator, v. Coleman and Co.*, 76 Ga. 652; *Farmers' Loan and Trust Co. v. Wilson*, 139 N. Y. 284.

- (a) As a general rule, has a principal power to revoke an agency?
- (b) If a principal has the power to revoke, does it follow in every case that he has the right to revoke?
- (c) In the above problem, can A revoke the power given to B? Why?
- (d) If A becomes insane, is the power given to B revoked by A's insanity?
- (e) If A dies, is the power given to B revoked by A's death?
- (f) If A pays the debt when it is due, can he then revoke the power to sell the goods?
- (g) If A had owed no debt to B but had merely given B power to sell the goods for him, could A then revoke that power?

4. Facts: A orders B to buy a horse for him. C orders B to sell a horse for him. B sells C's horse to A. A does not know of C's order and C does not know of A's order.

Ruling Cases: *Cannel v. Smith*, 142 Penn. State 25; *Bunker v. Miles*, 30 Me. 431.

- (a) Is A bound by B's purchase from C?

- (b) Is C bound by B's sale to A?
- (c) Can B recover compensation for his services?
- (d) If A had known that B also acted as agent for C, and C had known that B also acted as agent for A, are both bound by B's act?
- (e) If each party, A and C respectively, had known that his agent was also acting for the other, can B then recover compensation for his services?
- (f) In the above problem, if B sells his own instead of C's horse to A, may A when he discovers it, rescind the contract?

5. Vice-Principal. Facts: A, a laborer in B's mill, is injured by the negligence of C, his superintendent.

Ruling Cases: *Crispin v. Babbitt*, 81 N. Y. 516; *Howells v. Landore Steel Co.*, L. R. 10 I. B. 62; *Lewis v. Seifert*, 116 Penn. St. 628; *Little Miami R. R. Co. v. Stevens*, 20 Ohio 415; *Brick v. R. R. Co.*, 98 N. Y. 211; and *R. R. Co. v. Ross*, 112 U. S. 377.

- (a) Are A and C fellow-servants? Why?
- (b) Can A recover from B, the mill owner? Why?
- (c) Is C, the superintendent, also liable?
- (d) If C, the superintendent, had been injured by A, could he (C) recover from B, the mill owner?
- (e) If, in the above problem, C had been injured by A, could he (C) recover from A? Why?

CHAPTER XXI

MISCELLANEOUS TOPICS

120. HYPOTHETICAL PROBLEMS

121. MOOT COURT CASE

122. SEARCH QUESTIONS (STATE LAWS)

120. HYPOTHETICAL PROBLEMS

Discuss fully and give reason in each case.

1. A offers a book for sale to several parties present; B, the owner, is present; C buys and gets the book. Can B object to the transfer of title to the purchaser?

2. A, an agent, has authority to buy grain for B with instructions not to pay more than a certain price. He pays more, however. Is B, the principal, bound?

3. A merchant directs his clerks not to sell certain overcoats in stock that are and remain in the salesroom. One of the clerks, nevertheless, makes a sale. Can the principal annul the contract?

4. A commissioner of public works lets a contract for paving, specifying certain thickness. A city ordinance requires a greater thickness. The contract is carried out. Is the city bound to pay? Is the agent liable?

5. An agent makes a contract with a third party in his own name. Is the principal liable?

6. An agent in selling goods makes false representations without the knowledge or consent of his principal. Is the principal liable? Would it have made any difference if he had specifically cautioned his agent to be honest?

7. A is an agent for B, and entered into a contract with C after B's death. Is the contract binding?

8. An agent is given authority to employ nine men. He employs eighteen men. Is the principal bound?

9. An agent makes a contract with a third party in excess of his authority. To whom does the benefit, if any, inure? On whom would a loss fall?

10. A instructs B to sell his horse for \$150. B sells the horse for \$175. To whom does the \$25 belong?

11. A instructs B, his agent, to employ labor on one of several houses in process of erection. B employs labor on all of the buildings. Under what circumstances, if any, is A bound to pay the extra laborers?

12. A is authorized by B to collect a debt from C. A employs D to make the collection, which he does and also spends the money. Who is liable to B? What recourse, if any, has A?

13. A, an engineer, is injured by the negligence of B, an engineer on the same road. Is the company liable?

14. A is a telegraph agent for a railroad corporation and is served with a summons to appear in court. Is this good service as regards the corporation?

15. An agent is directed to purchase a team for his principal. He transfers to his principal a team which he owns, charging a reasonable price. Discuss rights of parties.

16. An agent is driving a load of grain to the market and at a cross road finds his way blocked by B, another driver, with team and wagon. A becomes enraged and purposely drives into and upsets B's wagon. Is A's principal liable for the damages? Would it make any difference if A in his hurry to get to the station accidentally ran into the other wagon and caused the same damage? Discuss.

17. Your class president, at a meeting of the class of fifty, offers for selection by the class several designs for a class pin. Five students are absent, and five object to the pin and vote against its adoption. The motion is declared carried by the president. Discuss the liability of the members of the class.

18. An accident occurs at a railroad crossing; the evidence at trial establishes the fact that the engineer failed to sound a warning and also that the party injured failed to take notice of the crossing signal. Discuss rights of parties.

19. A, without knowledge of B, bought a horse for B and placed the animal in B's barn. B used the horse for a couple of

days without knowledge of the facts. When B learned the facts, he repudiated the purchase, stating that A had no authority to bind him. He offered the horse to the original owner who refused to accept him. Discuss rights of parties.

20. A is the owner of two matched horses, Prince and King. The former is vicious at times, while the latter is a well-behaved horse. The value of the good horse is at least \$1000.00. The other would be of the same value if he were dependable, but as it is his value is considerably less. A, the owner, desires to sell Prince. B is a prospective buyer, but knows nothing of the viciousness of Prince. A directs the stableman to bring out King for exhibition. The man complies, and the horse is put through his paces, greatly to the delight of B, who says, "I will give you \$600.00 for this horse." Finally A says, "Agreed," and directs the man to put the horse back in his stable. B pays the cash to A, who directs his man to bring out the horse, but in an aside says, "Prince." The man misunderstands and brings out King. B leaves, leading the horse home. A does not discover the mistake until a few hours later. He immediately demands the return of the horse on the ground of misrepresentation and fraud, at the same time offering to return the money. Discuss.

121. MOOT COURT CASE

Action: This is an action on appeal for damages. The case was decided in the lower court in favor of the company. The case is being argued before the court of appeals in your state.

Facts: Mr. A is employed as a buying agent for the American Grain Company. His authority appears to be that of a general agent, buying wheat throughout the Northwest. He buys on account, for cash, and on short term notes for the company, makes arrangements with elevator men, pays storage, and contracts with railroad companies for the transportation of wheat. Mr. A is generally known throughout the wheat section as the buyer for the American Grain Company.

Mr. A, who is a close student of markets, notices the upward tendency of wheat and a like tendency of corn and oats. Without waiting for advice from the firm, he buys and ships 5000

bushels of corn to his firm. The firm accepts the corn, but wires A to stick to wheat unless otherwise directed. He, notwithstanding, sends in a few shipments of corn and the firm says nothing about it. Later in the season the agent buys and ships a carload of oats. The company refuses to receive the oats, and so wires the agent and the seller of the oats. The oats are sold by direction of the agent to another company at a loss of \$150.00.

The controversy is in regard to the loss. The seller is attempting to recover from the company.

Issue: Can the seller recover the loss from the American Grain Company? Prepare arguments for plaintiff and defendant.

122. SEARCH QUESTIONS (STATE LAWS)

What amount of wages are exempt from garnishment?

What are servants' rights as to wages?

In case of a failure are servants' wages a preferential claim?

Is there an "Employers' Liability Act"? What are its provisions as to injury to one servant by another? What provisions as to safe tools and machinery, safe place to work, competent servants, rules and regulations, etc.?

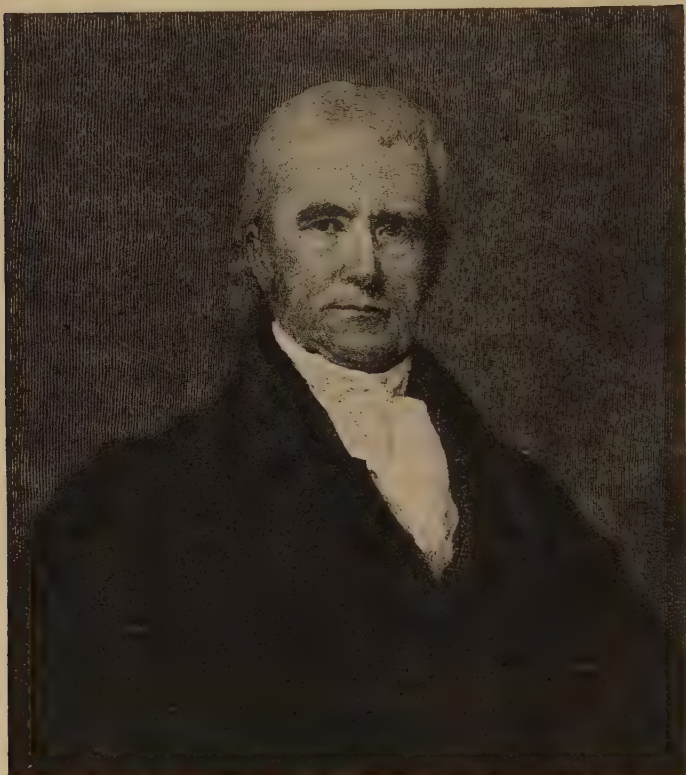
Is there a law that dangerous machines such as threshing machines, laundry machines, circular saws, gearings, etc., shall be properly boxed?

May an employee who is injured by another employee in same capacity collect damages?

May an employee who is injured by defective machinery collect damages? If he knew the machinery to be defective? If he reported the defect to the employer, who disregarded the notice or intimated that some one else could run the machine?

Does your State allow comparison of negligence, that is, allow damages where the employer was the more negligent?

Are foremen of shops, etc., known as vice-principals?



JOHN MARSHALL (1755-1835)

Soldier, statesman, and one of America's greatest chief justices of the Supreme Court.

Marshall was appointed to the Supreme Court at a time when the relationship of the written Constitution to legislative enactments was being considered by both the strict and loose constructionists. It was during his incumbency as Chief Justice that interpretations by the Supreme Court through its decisions definitely determined the status of the Constitution. "The Constitution, since its adoption, owes more to him than to any one single mind for its true interpretation and vindication." In the celebrated case of *Marbury versus Madison*, Marshall clearly and logically sets right the question of conflict between the Constitution and a legislative enactment: "If a law be in opposition to the Constitution, the court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law." Upon this decision rests the authority for the annulment of over twenty acts of Congress and some two hundred State laws as in conflict with the national Constitution.

CHAPTER XXII

PARTNERSHIP

123. INTRODUCTION

124. DEFINITION

125. PURPOSE

126. WHO MAY BE PARTNERS

1. Express
2. Implied

127. PROFITS

128. ARTICLES

1. The Firm Name
2. Capital
3. Losses and Gains
4. Partnership Property
5. Property Acquired in Name of Partner
6. Good-Will
7. Notice

129. QUESTIONS ON TEXT

123. Introduction. In the present subject, partnership, the two preceding topics, contracts and agency, are found in practical combination. The formation of the partnership is the result of contractual relationships established by individuals called co-partners or partners, and the operation of the partnership is a question of agency.

124. Definition. Partnership is the legal relationship created when several parties combine for the purpose of carrying on some industrial enterprise, each contributing capital or services, or both, and each to receive a share in the profits.

Partnership is sometimes defined as "a voluntary contract

between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a community of profits thereof between them." For a terse, though somewhat broad, definition the following may be taken: "A partnership is an association of two or more persons to carry on as co-owners a business for profit."

125. Purpose. The partnership relationship may be created for the purpose of carrying on any lawful business. While partnership contracts were once confined to trade and commerce merely, at the present time they are formed for all conceivable enterprises—mining, farming, stock-raising, lumbering and professional occupations, such as law, medicine, dentistry, and the like.

If, however, the partnership is created for the purpose of furthering some unlawful purpose, the contracts so made are unenforceable. The rules laid down in the chapter on contracts relative to illegal undertakings are applicable here.

126. Who May Be Partners. The general rules of contract prevail. Anyone capable of entering into a contract may, by agreement or by implication, become liable as a partner. Persons whose contracts are void or voidable are protected to the same extent in partnership. (See Case No. 38.)

1. *Express.* The relationship of partnership is one of contract and may be either express or implied, written or verbal. An express agreement is the result of a mutually expressed desire to be bound.

2. *Implied.* The contract of partnership may be established by implication, for the purpose of protecting or enforcing the rights of a partner or for the purpose of enabling a third person to enforce a contract. The former has in view the contract, the latter, the protection of the third party, which is a question of public policy.

In order to establish a partnership contract, the third party must show, first, that the supposed partner has knowledge of the fact that he was being held out as a partner, and that it was with his consent; and second, that the third party so endeavoring to

establish the relationship exercised reasonable care and prudence and relied on such conditions in good faith.

127. Profits. The contract of partnership is primarily formed for the purpose of producing profits. To obtain the result of trade in association, there must be a division or sharing of profits; however, there need not always be a sharing of losses. In the early adjustments of partnership questions, in determining whether the relationship of partners existed, the question, How are the profits to be shared? was a vital one. Profit is the distributive part after creditors have been paid in full.

There must be community of principals sharing the joint profits. This excludes all agents or servants who may receive a share of the profits in lieu of wages.

128. Articles. While no formality is essential in the formation of a partnership, the contract is so important that no part should be omitted, nor should any detail be considered too slight to be recorded.

The contract of partnership is usually a written contract enumerating the important parts and known as articles of partnership. These articles should include, generally, the following: Firm name, duration, object, restrictions, investment, proportion of profits, and duties of each partner. The articles should be signed by each partner. Some of these articles will be discussed; some need no attention.

1. *The Firm Name.* A firm name is not absolutely necessary but is customary. It may include the names of the partners, some or part of their names, or may be distinctive of the business.

The only restriction is that one firm may not use the same name as that of another for the purpose of misleading the public. There is no law, however, to prevent a number of persons from using their own names as a firm name in carrying on a certain business, even though their name may be the same as that of some other firm. This, however, must be in good faith and not used as a deceit. (See-Case No. 39.)

2. *Capital.* The capital of a firm is the total of the several investments made by the partners. If not otherwise shown in the

articles these are understood or presumed to be equal. The investment of each partner need not be in money, any kind of property may be placed in the common pool; in fact, simply the use of property may be invested, the title remaining with the partner.

3. *Losses and Gains.* In the absence of any specific agreement the law presumes an equal distribution of the profits. While to constitute a partnership the sharing of the profits among the partners is essential, the losses need not be so shared. To receive a share of the profits in lieu of salary does not create a partnership.

4. *Partnership Property.* This consists of the property originally invested by the partners as well as that subsequently acquired by the partnership. The title is in the partnership, and, in general, there is no limit to the amount of capital a firm may have.

5. *Property Bought or Acquired in Name of Partner.* When one partner takes title to property purchased with partnership funds in his individual name, he holds it in trust for the partnership. The title to personal property may be held in the name of the firm, and all papers relating to business interests, such as notes, checks, mortgages, may be given or held in the firm's name.

6. *Good-Will.* "The good-will of a trade is nothing more than the probability that the old customers will resort to the 'old place' to do business," but, after all, it is only a hope grounded upon a probability.

The good-will is an asset and passes with a sale of the business, but does not necessarily pass with a sale of the stock.

7. *Notice.* In the usual course of business, notice that comes to the attention of a partner is notice to the partnership.

129. QUESTIONS ON TEXT

What is a partnership? Its object? Who may be partners? Define partnership by express terms. By implied terms. Give examples. What has profit to do with establishing partnership? What are some of the things that should be included in a written contract of partnership? What may be invested as capital? What is the rule as to distribution of gains? Of losses? What is good-will? Give examples of business houses in your knowledge whose good-will would be valuable.

CHAPTER XXIII

POWERS AND LIABILITIES

130. POWERS

131. LIABILITY OF PARTNERS

132. TRADING AND NON-TRADING PARTNERSHIPS

133. SCOPE OF BUSINESS

134. KINDS OF PARTNERS

1. Real, or Ostensible Partner
2. Nominal Partner
3. Dormant, or Silent Partner
4. Limited Partner

135. QUESTIONS ON TEXT

130. Powers. The partnership relation is one of principal and agent and the general rules relating to the powers and liabilities as laid down in the chapter on agency apply here. Each partner is a principal and at the same time an accredited agent for the partnership. When no powers are agreed upon, by implication those customary in that kind of business are understood. The restriction of the power of certain members of the firm, however, which would be binding upon the partners would be inoperative as against a third party without notice of the restriction. "Where a partnership is limited to a particular trade or business, one partner cannot bind his co-partner by any contract not relating to such trade or business, and third persons will be presumed to have knowledge of the limited nature of the partnership from circumstances connected with the business of the firm."

131. Liability of Partners. Each partner is at once a principal and an agent. He is liable personally as well as collectively on all contracts made either by himself or by his associates in the

business of the partnership. He is also liable for the torts of his partners committed in carrying out the partnership business.

132. Trading and Non-Trading Partnerships. There is an important distinction between the powers of partners engaged in a general buying and selling business and that of partners whose business is one of occupation or employment. In the case of the former much broader powers are presumed and greater latitude of commercial activity granted in favor of the partners. In an occupational or professional partnership the power of the partners to bind their co-partners is strictly limited, the business being one in which the making of contracts with third parties is merely incidental.

133. Scope of Business. The scope of the business includes, besides all acts expressly provided for, all other acts that are incident and necessary to the full development of the partnership business. Third parties without notice are not bound by limitations of scope laid down in the articles but by the acts and representations of the partners in the general course of the business.

134. Kinds of Partners. Partners are classified as real, or ostensible; nominal; dormant, or silent; and limited.

1. *Real, or Ostensible Partner* is one who is held out to the public as a general partner, active in the management of the business, and who shares in its losses and gains.

2. *Nominal Partner* is a partner in name only, participating in neither management, losses, nor profits.

3. *Dormant, or Silent Partner* is a partner with an interest in the business but this fact is unknown to third parties. When disclosed he at once becomes liable for the debts of the firm.

4. *Limited Partner.* Some States have enacted statutes whereby one or more, but not all, partners may limit their liability for the debts and obligations of the firm under specified conditions. Strict compliance with the statute is required and deviation therefrom results in the limited partner becoming liable as a general partner.

135. QUESTIONS ON TEXT

What is the relationship of partners? What is the extent of the powers of a partner? What is the liability of partners? What is the distinction between trading and non-trading partnerships? What is the meaning of the "scope of the business"? What is its limit? Define the different kinds of partners? What is a limited partnership? What is the distinction between a limited partnership and a limited partner?

CHAPTER XXIV

DISSOLUTION AND ITS CONSEQUENCES

136. DISSOLUTION

1. By Original Agreement
2. By Subsequent Agreement
3. By Operation of Law
4. By Decree of Court
5. Notice

137. EFFECT OF DISSOLUTION

138. FINAL ACCOUNTING

139. QUESTIONS ON TEXT

136. Dissolution. A dissolution of the partnership may be brought about: (1) By the original agreement; (2) by subsequent agreement; (3) by operation of law; (4) by decree of a court.

1. *By Original Agreement.* The articles of partnership may, and generally do, provide for the dissolving of the partnership agreement and the conditions thereof.

2. *By Subsequent Agreement.* By mutual agreement the partnership may be dissolved at any time irrespective of the provisions of the articles.

3. *By Operation of Law.* Certain events may automatically effect a dissolution; e.g., death of a partner, bankruptcy, or insanity of a partner.

4. *By Decree of Court.* A court having jurisdiction may order dissolution of a partnership or may even declare the original partnership agreement void. A court of equity may order a dissolution when it is evident that the business can never be a success, when fraud is evident in the inception of the partnership, when one partner has become insane or otherwise mentally incapacitated, or where a partner is guilty of misconduct in the operation of the business.

5. *Notice.* As the dissolution is to terminate the liabilities of the partnership, notice to the public is necessary. In general, a written notice to those persons dealing with the firm, and a general notice in the local or trade newspapers is sufficient.

137. Effect of Dissolution. Obviously dissolution terminates the partnership agreement and the majority of the powers created by it. Only such powers remain as are necessary to wind up the affairs of the firm, to collect debts, to pay indebtedness, to sell firm assets and make final distribution of any balance according to the original agreement.

138. Final Accounting. Following a dissolution, an accounting is necessary. An eminent jurist says: "In adjusting the accounts of partners, losses ought to be paid first out of assets, excluding capital, next out of capital, and lastly by having recourse to the partners individually; the assets of the partnership should be applied as follows:

"1. In paying the debts and liabilities of the firm to non-partners.

"2. In paying each partner ratably what is due from the firm to him for advances, as distinguished from capital.

"3. In paying each partner ratably what is due from the firm to him in respect to capital.

"4. The ultimate residue, if any, will then be divided as profit between the partners in equal shares, unless the contrary be shown."

139. QUESTIONS ON TEXT

In what ways may a dissolution be effected? Explain each. Name the grounds for a decree of dissolution. Explain notice. On dissolution what powers cease? What ones remain? Enumerate steps, on dissolution of partnership, of disposition of firm property.

CHAPTER XXV

MISCELLANEOUS TOPICS

140. APPLICATION OF COURT DECISIONS TO FACTS

141. HYPOTHETICAL PROBLEMS

142. CONSTRUCTION WORK

143. MOOT COURT CASE

144. SEARCH QUESTIONS (STATE LAWS)

140. Application of Court Decisions to Facts. 1. *Action:*

This is an action on debt, or for damages through breach of contract. Facts: Richard Roe and John Doe entered into a partnership under the firm name, "Roe and Doe." They employed A as their agent for a period of one year to make collections for them. At the end of five months Richard Roe, one of the partners, died. John Doe, the surviving partner, maintains that the death of Richard Roe, who was a joint principal with him (Doe) in employing the agent, dissolved the partnership, and that, therefore, the agency is revoked and the agent is discharged, or may be discharged, and that he cannot recover for the unexpired term of the contract. The agent claims that he was employed for one year and that he can recover for the full time that he was employed, as he is able and willing to perform his part of the contract.

Ruling Cases: *Fereira vs. Sayres*, 5 Watts & S. 210; and *Griggs vs. Swift*, 82 Ga. 392.

- (a) If Richard Roe is not a member of a partnership, but as a single principal he employs A to act as agent for him for a year, will Roe's death at the end of five months immediately revoke the agency for the unexpired term of the contract, so as to release Roe's estate from any further liability to the agent for said unexpired term?

- (b) Did the death of Richard Roe dissolve the firm Roe and Doe? If so, why? If not, why not?
- (c) In a partnership, is one partner liable for all the partnership obligations of the firm?
- (d) If the firm, Roe and Doe, had leased a building for one year, would the death of Roe have released the surviving partner, Doe, from the payment of the rent for the unexpired seven months? Reasons.
- (e) Assuming that the death of Roe dissolved the partnership of Roe and Doe, is the agent thereby discharged or can he be discharged? Reasons.
- (f) If the firm, Roe and Doe, had been voluntarily dissolved at the end of five months, would such voluntary dissolution relieve it of liability to the agent for the unexpired term of the contract? Reasons.
- (g) If, through the death of Roe, this partnership in the eyes of the law is held to be dissolved, is Doe, the surviving partner, thereby released from the further fulfillment of the firm's contract with A, the agent? Reasons.
- (h) In the eyes of the law, does it make any difference whether a firm is voluntarily dissolved or dissolved by death so far as the firm's obligations to the agent are concerned? Does it make any difference on principle?
- (i) Can A, the agent, recover for the full time that he was employed?

2. *Existence of Partnership.* Facts: A and B had entered into a contract with the city of C to do some public work, on which they expected to realize a large profit. They did not have sufficient funds to go on with the work, but D promised to furnish the money under an agreement with A and B by which the latter agreed to perform the work, receive payment therefor, pay all bills for labor and materials, and divide the net profits with D as follows: Two-thirds to A and B and one-third to D. One E sues D for materials furnished for the work.

Ruling Cases: *K. I. L. & T. Co. v. Masterson*, 100 Texas 38; and *Mecham v. Valentine* 145 U. S. 611.

- (a) Is D a partner in the firm of A and B?
- (b) If D is a partner, what kind of a partner is he?
- (c) If D is a partner, is he liable for the entire debt, or for only one-third of it?
- (d) If D is liable for the whole debt, has he a right to proceed against A and B for the share they ought to pay?
- (e) If D had merely loaned a sum of money to the partnership A and B

under an agreement that he shall be paid legal interest thereon, and in addition thereto shall also be paid one-twentieth of the yearly profits of the partnership business, if those profits exceed the sum lent, does he thereby become liable as a partner?

3. *Partnership Debt, Debt of Individual Partner. Rights of Creditors.* Facts: A and B are partners. They owe a partnership debt to C, who sues them and obtains a judgment against them.

Ruling Cases: *Meech v. Allen*, 17 N. Y. 300; *Cumming's Appeal*, 25 Penn. St. 268; *Smith v. Orser*, 42 N. Y. 132; *Clarke v. Cushing*, 25 Cal. 617; *Remheimer v. Hemingway*, 35 Penn. St. 432.

Answer these questions:

- (a) Must C first exhaust the firm property before he can attach the personal property of A?
 - (b) If there is sufficient firm property to pay the judgment, would it be just that C should be allowed to proceed against the personal property of A? Why?
 - (c) If there is sufficient firm property to pay the judgment, can A make a valid objection to C's proceeding against him? Why?
 - (d) If there is sufficient firm property to pay the debt, can a court of equity, under any supposition, intervene and prohibit C from proceeding against A? If so, under what supposition?
 - (e) Assume that A and B are partners and that A individually owes C and that C obtains a judgment against A individually on the debt due from A to C and that execution issues, can the sheriff seize the firm property of A and B and sell it to satisfy the execution?
 - (f) Under the supposition in (e), will a court of equity intervene by injunction to stop such a sale of partnership property to satisfy a judgment against A?
4. *How a Partnership May Be Dissolved.* Facts: A, B, and C were partners in a manufacturing enterprise in X. After being in the business for several years, A moved away, gave up the business, and wrote to B that B and C could dispose of the business as they saw fit. Subsequently B and C formed a new partnership and managed the business on their own account.

Ruling Cases: *Blake v. Sweeting*, 121 Ill. 67; *Sellers v. Shore*, 89 Ga. 416; *Groth v. Payment*, 79 Mich. 290.

- (a) Did the act of A operate as a dissolution of the old firm? Why?
- (b) If A, instead of abandoning the business, had died, would his death have dissolved the partnership?
- (c) If A, instead of abandoning the partnership, had become insane, would his insanity at once have dissolved the partnership?
- (d) If the articles of partnership provided that the co-partnership should continue five years, could it be dissolved before the expiration of that time by the mutual consent of all the partners?
- (e) If A, instead of moving away and abandoning the business, had sold his interest in the firm to D, a stranger, would his act at once have terminated the partnership, if there was no agreement as to the length of time the partnership should continue?
- (f) Can D under the supposition in (e) compel B and C to accept him as a partner?
- (g) If B and C under the supposition in (e) refuse to accept D as a partner after he has purchased A's share, what are D's rights?
- (h) If D, the stranger, to whom A sold, under the supposition in (e), is satisfactory to B and C and they admit him as a partner, is thereby a new partnership formed, or is it still the old firm with a new partner substituted for A?
- (i) If, in the above problem, A had become bankrupt, would his bankruptcy operate as a dissolution of the partnership?
- (j) If the firm A, B, and C had become bankrupt, would the firm bankruptcy operate as a dissolution of the partnership?

141. HYPOTHETICAL PROBLEMS

1. A, B, and C are members of a partnership, investing as follows: A cash \$10,000, B real estate valued at \$8,000, and C his experience as a manufacturer. The business produces a profit of \$10,000 at the end of the first year. Nothing is said as to the division of profits. Discuss rights of partners relative to profit.

2. Same as in 1, but A withdrew during the year \$2,000, B \$1,500, and C \$1,200, thus leaving a profit of but \$5,300. There is no provision in the agreement as to partners' withdrawals. Discuss rights of partners as to profits.

3. D, E and F are partners, each investing cash \$9,000. They indorse accommodation paper amounting to \$50,000 which they are obliged to meet. The firm assets are as listed, and their

individual resources are as follows: D resources \$50,000 and liabilities \$14,000; E resources \$20,000 and liabilities \$12,000; F no resources or liabilities. Discuss settlement.

4. Later, F, of problem 3, inherits \$50,000. Discuss contributory rights of D and E.

5. G and H are partners, making equal investments. G is sick the greater part of the year and H claims pay for the extra work he performed. Discuss rights of partners.

6. I and J are partners in the grain business. I is in the grain country as buyer, shipping the grain to J for sale. I makes a purchase at less than market price, thereby saving \$200. This sum he retains, reporting the purchase at market prices. Later, I learns of this. Discuss rights.

7. K and L are partners. They dissolve partnership after paying all known debts. Later a claim against the partnership for \$100 is presented to K, who pays on advice of counsel. Discuss rights.

8. M and N are partners who fail with liabilities of \$30,000 in excess of resources. Their individual properties and debts are as follows: M \$100,000 resources and \$20,000 debts; N \$5,000 resources and \$6,000 debts. The creditors proceed against the partners individually and seize M's resources. Discuss settlement.

9. O and P are partners, and agree as to the amount of credit several of their customers are to be allowed. Subsequent to this, and unknown to P, O allows several customers to exceed the agreed limit. As a result of this the firm loses \$5,000. Discuss the rights.

10. Q and R are partners for an exact term of years. Does the partnership terminate at that time, or must the partners proceed to dissolve? May they continue without regard to the time limit?

11. S, T and U are partners. In the agreement there is a clause stating that on the death of a member the two remaining ones may purchase the deceased's interests for \$5,000. A death occurs, and the purchase is made. Is this a new firm, or the old firm as per the agreement?

12. V, W and X are partners, X being a limited partner. The

firm fails in business with \$8,000 liabilities in excess of resources. Each partner has private resources in excess of the firm liability. Discuss rights of creditors.

142. CONSTRUCTION WORK

Draw up the following: Articles of Partnership.

Made and entered into—4 partners—date.....

1. Carrying on business—describe it—terms of years—allow for a partner's withdrawal from business.
2. The name of the firm shall be.....location of
3. What each shall contribute
4. Amount that each may withdraw when
5. Gains and losses to be divided.
6. What each shall do
7. Agreement in carrying on business.
8. The keeping of accounts—double entry—statements from time to time—money receipts and payments—how made.
9. What shall not be done—indorsing paper—guaranteeing accounts—lending money.
10. At end of each year, inventories—closing accounts—balance sheet—transferring loss and gains share to individual accounts.
11. How to adjust differences.
12. Properly signed and attested by three witnesses.

143. MOOT COURT CASE

1. A, B and C form a partnership. A invests cash \$10,000.00, B real estate valued at \$15,000.00, and C invests merchandise inventoried at \$18,000.00. Before starting the business they admit D as a limited partner who invests \$5,000.00 in cash. The proper papers are made out admitting D as a partner with limited liability but through carelessness the papers were never filed. A and D are members of considerable means, while B and C have all their property, not exempt from attachment, in the business. The firm continues for several years, but finally, owing to vigorous competition, it is forced into bankruptcy which develops a liability considerably in excess of the assets of the company. The fact that D is a limited partner is generally known, and he has always acted in his proper capacity as a partner. The receiver proposes to proceed against the property of A and D. This is vigorously resisted by both A and D.

Prepare and try the case before a jury.

The defeated party will try the case on appeal.

144. SEARCH QUESTIONS (STATE LAWS)

Is there a uniform partnership act? Is there a uniform limited partnership act? What powers have limited partners as to conduct of business with outsiders? How does the limited partner preserve his limited liability? What if he does not observe the regulations as prescribed by statute? Has he the right to demand an accounting? What general provision is there providing for the continuation of the partnership in case of the death of a general partner? May a married woman on her own account enter into a contract of partnership?

CHAPTER XXVI

NOTES AND BILLS

145. INTRODUCTION

146. MONEY

147. CREDIT

1. Basis of Credit
2. Institutions of Credit
3. Instruments of Credit

148. FUNCTIONS OF A BANK

149. BANKS

1. National Banks
2. Federal Reserve Banks
3. Clearing House

150. ASSIGNABILITY

151. NEGOTIABILITY

145. Introduction. The present age of specialization calls for a multitude of exchanges to carry a product from the producer to the consumer. To accomplish these exchanges, resort is made to money and credit.

146. Money. Money performs the following functions:

1. A medium of exchange.
2. A common denominator.
3. A medium of deferred payments.

Illustrations: (1) A man works as a carpenter and receives \$11.50 for a day's pay. He gives this to a merchant for a pair of shoes and a cap. The money is the medium whereby he exchanges his services for the goods he desires.

(2) A desires to trade a cow for some sheep. A sheep and a cow are measured as to exchange value by a dollar, and the values

are, say, \$60.00 for the cow and \$15.00 for the sheep. The exchange is then made on the basis of one cow for four sheep.

(3) A debt of \$5000.00 is contracted as of January 2, 1914, due and payable in ten years. The cancellation of the debt is effected through the payment of money or its equivalent. This is the weakest function of money, as its purchasing power may change during the period. As if, in 1914, the purchasing power of the dollar is taken as a basis, it is found to be only 65.4 in January, 1924.

147. Credit. The money of a country is greatly inadequate to the satisfaction of all claims for exchanges of services and goods. Credit comes to the assistance of money by adjusting the payment at a future time, and thereby enables the payment of one claim to the cancellation of another claim. Credit is therefore the transfer of services, goods or funds on a promise of future payment.

(1) *Basis of Credit.* The basis of credit is confidence, stability of the money market, and the assistance of the legal machinery of the government in the enforcement of all agreements or contracts.

(2) *Institutions of Credit.* The institutions of credit are banks and clearing houses.

(3) *Instruments of Credit.* The instruments of credit are paper money, notes, checks, drafts, trade acceptances, bonds, certificates of stock, warehouse receipts, bills of lading and others.

148. Functions of a Bank. The chief functions of a bank are: (1) Deposits; (2) Loans; and (3) Issue. Expanded, these functions include: (a) Receiving money on deposit against which checks are drawn, or withdrawal slips are honored; (b) issuing paper money; (c) discounting notes and acceptances for customers; (d) loaning money to finance manufacturing and commercial enterprises; (e) allowing interest on deposits, and frequently charging interest when an account carries a balance less than a certain amount; (f) collecting money due for customers; (g) making remittances for customers; (h) selling drafts on other cities, domestic or foreign, to customers; (i) buying and selling stocks and bonds; (j) giving advice to customers relating to safe invest-

ments; (k) promoting savings by encouraging the deposits of small amounts, by which the clerk, or laborer becomes a capitalist; (l) selling travelers' checks or letters of credit to those going to other countries; (m) acting as trustee for estates, administering wills, and acting as guardian; (n) renting safety boxes to customers to secure valuables; (o) and other financial matters.

149. Banks may be classified as follows:

Commercial Banks	Either State or National
Savings Banks	State
Trust Companies	State

The second and third are generally combined.

(1) *National Banks* are operated and controlled by the laws of Congress and are known as National and Federal Reserve Banks. The latter is a banker's bank; that is, does business with banks and the government. Both of these banks, under the control of the government, issue paper money.

National banks issue paper money secured by United States bonds that the bank purchases and deposits with the United States Treasury. The amount of such issue may not be more than the capital stock of the bank. The total amount of paper money issued is equal to the par value of the bonds deposited as security. Five per cent of the amount must be deposited as a Redemption Fund with the United States Treasury.

(2) *Federal Reserve Banks* were established in 1913. The main provisions are:

- (a) There are twelve regional districts with one Federal Reserve Bank in each.
- (b) It is a banker's bank, and also may be the bank for the government.
- (c) All the National Banks must be members.
- (d) All other banks may become members.
- (e) All member banks must subscribe for capital stock in the Federal Reserve Bank to the extent of six per cent of its own capital and surplus. Only three per cent of this amount has been called. The second call probably will not be necessary.

- (f) The Federal Reserve Banks issue two kinds of paper money: Federal Reserve notes secured by rediscounted commercial paper and a gold reserve, and Federal Reserve Bank Notes based on government bonds.
- (g) The chief function of the Federal Reserve Bank is the power to purchase accredited discount paper from the member banks. This power is known as "rediscount." This is the provision that makes our money "elastic."
- (3) A *Clearing House* is an association of banks for the purpose of exchanging the checks on other banks that each receives from its customers during the day.

150. Assignability. This is a right recognized by the common law; it is the right to transfer or assign a right or claim held against another. For example: A sells and delivers certain chattels to B for \$100, for which B is to pay A in 30 days. First, this is a contract partly executed. The payment remains to complete the contract. The law recognizes A's claim as a *chose in action*; it is a right that may be disposed of by sale or assignment. A sells this claim against B to C for a certain sum. C acquires only the rights possessed by A at the time of the sale. C should now notify B of his acquired rights and direct him to pay to him, C, the amount then due. C has protected his rights, which we will now examine. Suppose that at the time A sold this claim, B held a debt, counter-claim, against A amounting to \$40.00; this is a set-off against the rights of C. The latter can only secure \$60.00 from B; he must look to A for the balance. Thus we say that the assignee acquires only the rights possessed by the assignor at the time of transfer and that to keep those rights intact he must notify the debtor of his acquired rights. A payment made by the debtor before notice but after sale, is a good defense against the assignee.

151. Negotiability. This term originated in the usage of the merchants of Europe, and has been gradually extended throughout the commercial world. It recognizes rights not known at the common law, chief among which are *grace*, *negotiability*, and *presumption of consideration*. Grace applies only to negotiable paper,

and is additional time granted the payer in which to meet his obligations, generally three days. Days of grace have been abolished. Negotiability is the element that is in reality the life of negotiable paper; it includes the right whereby the purchaser, under certain conditions, is enabled to collect the amount the instrument calls for, irrespective of defenses between the original parties. A set-off or counter-claim does not follow and attach as in assignment. A *presumption of consideration* exists in favor of all negotiable paper unless this presumption is overcome by evidence. The presumption is that the paper was given for value.

To recapitulate: The assignee acquires the *rights of the assignor* subject to existing claims or defenses. The purchaser of negotiable paper acquires *full title*, and the right to collect the full amount, notwithstanding that counter-claims and defenses may exist between the original parties. The transfer defeats existing claims or defenses. This is the law of negotiability.

To a limited extent negotiable instruments of credit circulate as money.

CHAPTER XXVII

ELEMENTS OF NEGOTIABLE PAPER

152. INTRODUCTION

153. ELEMENTS

1. Contract in Writing
2. Absolute Promise or Order
3. Certainty as to Time
4. Certainty as to Amount
5. Payable in Money
6. Specification of Parties
7. Negotiable Words
8. Delivery

154. SOME NON-ESSENTIALS

1. Date
2. Value Received
3. Days of Grace

155. LIABILITY

156. QUESTIONS ON TEXT

152. Introduction. Negotiable instruments are contracts of a special character. They include notes, checks, drafts, travelers' checks, letters of credit, trade acceptances and others.

153. Elements. 1. *Contract in Writing.* All negotiable contracts must be in writing and signed. While an oral promise under common law might be a valid contract, it could not be considered negotiable under the law merchant. The writing may be with ink or in pencil on any ordinary writing material. It may bear a seal.

2. *Absolute Promise or Order.* The promise contained in the note, or the order on a third person in a draft, must be an unconditional promise or order to pay money; any condition would make the contract non-negotiable and subject to the rules of the

common law. Courtesy of language, as "please pay," will not affect the negotiability; it is no less an order or promise to pay. In a note payable on or before a certain date, the paper is payable absolutely on that date, but may be paid earlier. If a note is made payable in the alternative, it is non-negotiable, and a note payable after the arrival of a particular steamer, or other uncertain event, is a conditional promise, and therefore non-negotiable, and the happening of the event does not cure the defect. A promise to pay on the death of a certain person is considered an absolute promise to pay. If made payable out of a certain fund the instrument is non-negotiable, as the promise is conditional. This is because of the uncertainty of the amount or existence of the particular fund. But it may direct that the payment be *charged* to a certain account or fund.

3. *Certainty as to Time.* Negotiable instruments are based on certainties, and time is no exception. It is payable on demand if it reads on demand, or at sight, or on presentation or in which no time is specified. Time is generally specified as "after date" or "after sight"; other words of the same import may be used. The word "month" means a calendar month; a note payable one month after August 30 is due on September 30, while a note payable 30 days after August 30 is due on September 29. Notes drawn on December 28-29-30-31 and each reading "two months after date," would all fall due on February 28, unless a leap year, when the first would fall due on the 28th and the rest on the 29th.

4. *Certainty as to Amount.* The amount to be paid must be certain, and stated in the instrument. If the amount cannot be definitely determined from a reading of the instrument, it is non-negotiable. The amount is generally written once in words and once in figures; but this is merely a precautionary measure. The amount in words controls.

(N. I. A.) The sum payable is a sum certain within the meaning of this act, although it is to be paid:

(1) With interest; or

(2) By stated installments; or

(3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or

(4) With exchange, whether at a fixed rate or at the current rate; or

(5) With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

5. *Payable in Money.* It has always been held that negotiable paper must be payable in money or an equivalent thereof. A note payable in merchandise is not a negotiable instrument, unless made so by statutory enactment. The U. N. I. A. says it is legal if it "designates a particular kind of current money in which payment is to be made." (See Case No. 40.)

6. *Specification of Parties.* There must be no uncertainty in regard to the parties to a negotiable instrument. Not only must it be shown who is the payer, but also it must be made certain to whom payment is to be made. The giver of the instrument must sign; the receiver may be indicated as in "bearer." The capacity of the parties to the contract is the same as in common law. Parties are classed as original and subsequent. The first class are the ones who made the original contract; the second includes all those who may at a subsequent time receive the contract. The first are familiar with the making of the contract; the second know of the contract as it stands completed; they probably know nothing of the real consideration, but they are bound by the contract as expressed. "It is not necessary that the signature of a party to a contract should appear at the end thereof. If his name is written by him in any part of the contract, or at the top, or at the right or left hand, *with the intention* to sign or for the purpose of authenticating the instrument, it is sufficient to bind him."

7. *Negotiable Words.* This element is the chief one that originated with the custom of merchants. Under the common law, *choses in action* were transferable only; that is, the buyer acquired the rights of the seller and no more. The law merchant goes farther and allows to the buyer a perfect title. In order to make a bill negotiable, the *intent* must be clearly shown. This is done by making use of the words, "order or bearer," or any word or words having the same import. Without these words the instrument is non-negotiable, and the holder takes it subject to defenses existing at the time of the transfer, or until notice of transfer is

made. When the word "order" is used, the name of the payee must also appear. If the word "bearer" is used, the payee's name may or may not appear. A paper reading "pay to the order of A" is the same as "pay A or order." One reading "pay to the bearer, A" is not negotiable, unless so made by statute.

8. *Delivery.* The last step necessary to put a negotiable instrument in circulation, or to make it effective, is to deliver it; and until this is done it has no validity. As long as the paper is in the hands of an agent, it may be recalled. The same is true of a paper still in the hands of postal authorities, for they are held to be agents of the maker.

If an instrument is delivered in trust to a third party to be delivered subject to a condition, it is called an escrow. Until the condition is complied with, no legal delivery has been made as between the original parties; but if title is acquired by a subsequent party in good faith, a complete delivery has been made. If a blank instrument properly signed is issued with authority to fill out, no further delivery is necessary. The holder may fill out the blank, even increasing the amount, and put the paper in circulation and the maker is bound to pay.

(N. I. A.) Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

154. Some Non-Essentials. 1. *Date.* The date is not necessary; it should be given, however; otherwise recourse must be had to parol evidence to fix the date, as the maturity of paper is in most cases determined by the date of the instrument. Papers may be post-dated as well as ante-dated. The presumption, however, is that the date of the instrument is the date of delivery.

2. *Value Received.* This term is not an essential to negotiable instruments, but is generally used. It originated with the introduction of notes, a creature of the common law. The term has not been eliminated, although notes were by English statute made to possess the elements of negotiability, thereby carrying presumption of consideration.

3. *Days of Grace.* Grace is an extension of three days to the

payer in which to make payment. It is an element of the law merchant, but it is not necessary, since by contract it may be excluded. Many of the States have by statute abolished days of grace. Originally, demand was made on the last day of the contract, the payer being allowed extra time, called grace, if necessary. In time this was always demanded, and the time of making the demand changed to the last day of grace. If the last day of grace is a Sunday or a holiday, the demand should be made a day earlier. When grace is not allowed, and the paper falls due on Sunday or a legal holiday, the demand is made on the first day following a Sunday or legal holiday; also since Saturday is, in banking, generally a half holiday, paper maturing on that day is carried over to the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday. In order to avoid this difficulty bankers generally direct that notes read payable as "on July 1, 1925," thus selecting business days for maturity dates.

155. Liability. Parties to negotiable instruments are classed as original and subsequent. The first are those who were parties to the original contract, and the second are those who afterward acquired a title. Liability is classified as absolute, or primary, and as conditional, or secondary. Absolute liability admits of no uncertainty; it is such liability as that assumed by the maker of a note or acceptor of a draft who, in substance, says, "I will pay." Conditional liability depends on some condition and is clothed in effect as follows: "If A does not pay, I will." This is the undertaking of a drawer of a check, or draft, or the indorser of any negotiable instrument.

156. QUESTIONS ON TEXT

What are the elements of negotiable paper? Explain each of the following: In writing, absolute promise, certainty of time, certainty of amount, payable in money, specification of parties, negotiable words, delivery, delivery in escrow.

Is a note legal when written with a pencil? Name and explain the non-essentials. Classify the liability of parties to negotiable paper.

A note reads payable to A on his marriage. Is it negotiable? Why? A

note reads payable on the death of a certain person. Is it negotiable? Why? A note reads payable out of a certain fund. Is it negotiable? Give your reasons. If the payment is chargeable to a particular fund or account? What is the difference between making a note payable out of a particular fund or charging the payment to a particular account or fund?

CHAPTER XXVIII

NOTES

- 157. INTRODUCTION
- 158. DÉFINITION
- 159. LIABILITY
- 160. PARTIES
- 161. KINDS OF NOTES
- 162. GENERAL PROVISIONS
- 163. ACCOMMODATION NOTES
- 164. JUDGMENT NOTES
- 165. COLLATERAL NOTES
- 166. MATURITY
- 167. INTEREST
 - 1. When Allowed
 - 2. What Rate
 - 3. Annual Interest
 - 4. Compound Interest
- 168. WHERE PAYABLE
- 169. COLLECTION
- 170. QUESTIONS ON TEXT

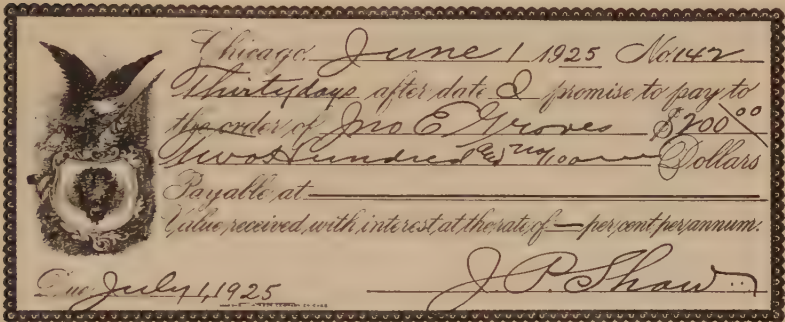
157. Introduction. This is one of the early forms of negotiable paper, made so by statute. By reading the note one sees that it is an absolute promise to pay.

158. Definition. A note is written evidence of a debt, coupled with an unqualified promise to pay.

In the first illustration J. P. Shaw is maker of the note and Jno. E. Groves is payee. It is not an interest-bearing contract, but will

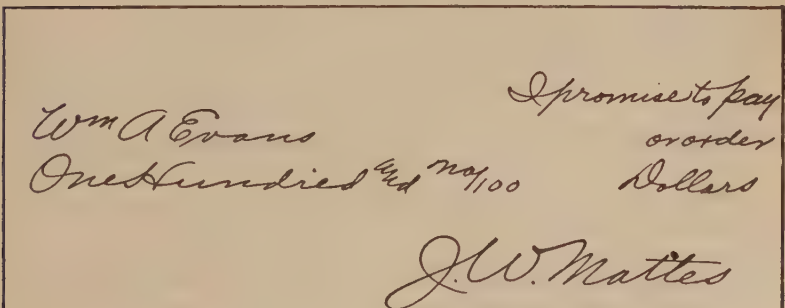
begin to draw the legal rate at maturity, if not paid at that time. It is the duty of Shaw to tender payment to the holder, but the holder may demand payment at the maker's place of business. Groves, the payee, may sell and transfer his interest in the agreement by writing his name on the back of the paper. It is a negotiable promissory note, as it contains all the necessary elements. Point out the necessary elements and indicate the non-essential terms used.

INDIVIDUAL NOTE



The following contains all the elements of negotiable paper. Name and point out each one. How would you establish the maturity of the note? Does it draw interest? Where is it payable? Does it specify the value given?

ELEMENTS OF A NOTE



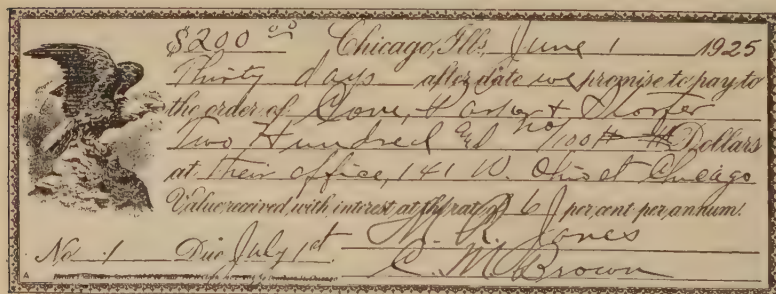
159. Liability. The maker of a promissory note is absolutely liable for its payment. Failure to demand payment at maturity will not excuse him. There is no liability on the part of payee; however, if he indorses and transfers the paper he becomes conditionally liable. That is, in substance, he says, "If the maker does not pay at maturity, I will."

160. Parties. The capacity of all parties to negotiable paper is the same as that of parties generally in contracts. The original parties to a note are two in number: the one, the *maker*, who issues the obligation and promises to pay; the other, the *payee*, to whom the payment is to be made.

161. Kinds of Notes. An individual note has but one maker. A joint note has several makers; as, "we promise to pay," or "we jointly," or "we jointly but not severally," would be examples of joint notes; so also, would one reading, "I promise to pay," signed by several makers, be a joint note. The makers agree to be held together.

A joint and several note is one signed by two or more parties as makers, generally reading "we or either of us promise to pay,"

JOINT NOTE



or "we jointly and severally promise to pay." The holder may proceed against any one or all to enforce collection. Joint notes are by statute law of most States made joint and several to facilitate collection.

162. General Provisions. The law merchant carries presumption of consideration; therefore, no statement relative to value is necessary. The use of the words "value received" is of long standing, but they may be omitted without affecting the paper. The date is not an essential element, but as the maturity is usually computed from the date of the paper, it is convenient. If omitted it may be supplied by parol evidence. Notes bear interest only when so stated. If "with interest" is included, the legal rate is meant. Any rate not contrary to law may be agreed upon. If the paper is silent as to the place of payment, it is the duty of the debtor, the maker, to seek the creditor and tender payment. If tender is not made at maturity, interest will begin.

163. Accommodation Notes. A may desire to accommodate B by the loan of a certain sum of money but may not have the ready funds. His credit at the bank, however, may be good, so he gives B his note for which no value is given. B now presents the note at the bank for discount and is accommodated with the use of the money. He is supposed to pay the note when it falls due; if he does not, the maker is liable for its payment. Had B held the note until due, he could not collect, for there was no consideration. A partner cannot bind the firm by an accommodation indorsement. An accommodation instrument in the hands of the accommodated party may be recalled by the maker at any time before the instrument is put in circulation.

164. Judgment Notes. A judgment note is an ordinary note to which is added a power of attorney enabling the holder to have

JUDGMENT NOTE

	\$500 ⁰⁰	Chicago Ill June 4 1895
	for months	after date for value received. I promise to
	Pay to the order of Aaron B Whitney	
	Dressed hundred and no 100	Dollars
	at his office 27 N State St	with interest
	at 6 percent per annum after date	until paid.
And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of Record to appear for me in such Court, on term time or vacation, at any time hereafter and confess a judgment without process in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and twenty dollar attorneys fee, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that <u>any</u> said attorney may do by virtue thereof.		
No. 24	James Smith Prin	Ells B Smith Secy

judgment entered without the initiatory steps of serving a summons and having a trial. To the power of attorney is generally added waiver of homestead exemption, and, commonly, a stipulated sum as attorney's fees is named. The advantages of such a note are all in favor of the holder. The judgment clause facilitates collection. Judgment notes are negotiable instruments.

(N. I. A.) reads: An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

(1) Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

(2) Authorizes a confession of judgment if the instrument be not paid at maturity; or

(3) Waives the benefit of any law intended for the advantage or protection of the obligor; or

(4) Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

165. Collateral Notes. This is also an ordinary note to which is added a certificate stating that the maker has deposited with the payee certain collateral securities, together with certain rights as incident thereto. It is a quick and safe way to realize ready money. For example, A desires to borrow from a bank five thousand dollars, and to that end deposits with the bank, say, five or six United States bonds of one thousand dollars each as security, together with his own note for the amount borrowed. The bank is abundantly secured and A is not obliged to sell his bonds to realize the necessary money. The certificate usually gives the holder the right to sell the securities in case the principal obligation is not paid. It is a negotiable instrument. The interest usually is taken in advance and the note drawn with interest after maturity.

166. Maturity. The maturity of a note is usually a certain time from the date of the note. The maturity may be stated

COLLATERAL NOTE

\$1000⁰⁰ Dayton O May 16 1925
Three months after date I promise to pay to the order of
Bankers Trust Co at their office in 100 Erie St
One thousand and no/100 Dollars,
 for value received, with interest at the rate of 6 per cent per annum, after maturity until paid.
C. D. Frederick
I have transferred and delivered to said Bankers Trust Co as Collateral security, for the
 payment of this and of any other liabilities of the undersigned to said payee, due or to become due, or that may hereafter be contracted, the
 following property, value of which is Twelve hundred fifty five and no/100 Dollars
 viz.: Five shares First mortgage Guarantee and Trust Co
One bond (\$500) Hamilton Club Chicago Ill
 And the undersigned hereby give the said payee and assigns authority to sell the said property, or any part thereof, or any substitutes
 therefor, and all additions thereto, on the maturity of the above note, or any time thereafter, or before, in the event of the said security
 depreciating in value, at any public or private sale, without advertising the same, or demanding payment or giving notice, with the right
 to said payee and assigns themselves to be the purchasers, when sale is made at any brokers' board or public sale. And after deducting all
 costs and expenses, to apply the residue to the payment of any, either or all liabilities as aforesaid, as said payee or assigns shall elect,
 returning the overplus to the undersigned; and in case the proceeds of the sale of said property shall not cover the principal, interest and
 expenses, the undersigned engages to pay the deficiency forthwith after such sale, with legal interest.
C. D. Frederick

in lieu of time: as, "On Nov. 1, 1925, I promise to pay." If the paper reads "On or before" a certain time, it is optional with the maker to make prior payment, but it becomes absolutely due at the designated time of maturity. If no time is stated, the note is due and payable on demand.

167. Interest. This is a share in production assigned to one who furnishes capital. It is computed at a certain per cent on the basis of one year. It is generally defined as payment made for the use or control of capital goods.

1. *When Allowed.* Interest is allowed in the following cases:

- When so stated in the agreement, as on a note.
- When a note falls due, even though the note reads for a definite time and "without interest."

- (c) When the credit term expires, as goods sold on 30 days credit. At the expiration of this time, interest begins.

2. *What Rate.* The statute laws designate a certain rate per cent as the legal rate which is the rate used when the agreement draws interest but the rate is not named. Most of the States also name a somewhat higher rate known as a contract rate; as, Florida names two rates, 8% and 10%, the first is the legal rate and the second is the contract rate. That is, parties may agree to any rate from no rate to 10%. Some States place no limitation on the contract rate. *More than contract rate would be usury*, which is charging a higher rate of interest than the law allows. If the State does not designate a contract rate there can be no usury. Such is the law in California. In Connecticut the rates are 6% and 12%, and the punishment for usury is forfeiture of principal and interest, and a fine. (See Case No. 41.)

3. *Annual Interest.* By special agreement, if interest is allowed on an unpaid balance of simple interest, it is known as annual interest. In annual interest the amount of the principal is not increased by the addition of interest on interest. For example, a thousand dollar note for five years reads "with interest at 6% per annum payable yearly." If this note and interest is not paid until maturity of the note, the interest would be computed as follows: Five years' interest on \$1000.00 at 6%, or \$300.00. This is the simple interest. The first year's interest, \$60.00, was unpaid for four years, the next for three years, the next for two years, and the next for one year, or, ten years' interest on \$60.00 at 6%, which is \$36.00. The total interest due and payable is \$336.00. Long time notes, unless having coupons attached, are drawn "interest payable annually," or one principal note and as many coupon notes as are necessary. These are drawn and signed at the time of the loan. The note and each coupon reads as drawing interest after maturity at, say, 6%. As each coupon note falls due it is presented for payment and if not paid draws interest. (See Forms page 320.)

4. *Compound Interest.* When the interest is computed for a period, as quarterly, semi-annually, or annually, and added to the principal for the next interest period and so on, it is known

as compound interest. It is not favored at law, and unless a special agreement is entered into cannot be collected. Savings banks allow compound interest by the practice they follow of adding the accumulated interest to the balance of the account as a deposit, and computing interest on the account for the next interest period. (See Cases No. 42 a-b.)

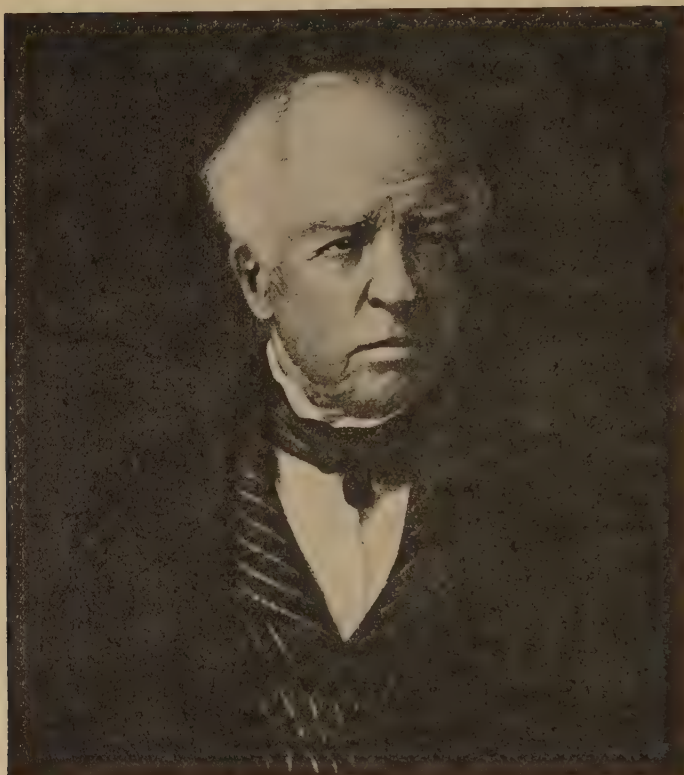
168. Where Payable. The note given at the beginning of the chapter is non-interest bearing. It is the duty of Shaw to find the holder and tender payment. If he fails to do so, interest at the legal rate commences. If a place of payment is named, the tender must be made at that place. When payable at a bank it is an order on the bank to pay for the account of the maker. For example, if a note is drawn in one State and payable in another, the payment follows the rule of the latter State. A note drawn in Oklahoma payable in Virginia bearing 10% has a usurious rate. Whereas, had it been drawn in Virginia payable in Oklahoma, it would not have been so considered.

169. Collection. A note is usually collected by the holder, or last indorsee. If a note or other negotiable instrument is collected by a bank or banks, it is a question of agency. A proper degree of care and promptness is required in such cases.

170. QUESTIONS ON TEXT

What is a note? Name and define the parties. What is the difference between a "joint" and a "joint and several" note? What are the general provisions relating to notes? Explain by illustration an accommodation note.

What features added to an ordinary note will make it a judgment note? What is a collateral note, and explain how used? How is the maturity of a note determined? When does a note draw interest?



JAMES KENT (1763-1847)

A celebrated American jurist, educated at Yale College, admitted to the bar in 1785, professor of law Columbia College, 1794-98. Later was Master in Chancery, member of the legislature, recorder, judge of the Supreme Court, Chief Justice, and Chancellor of New York. In 1823 again entered Columbia. From his lectures and writings grew the *Commentaries of American Law* (four large volumes). As chancellor he rendered his greatest service to American jurisprudence. Johnson's Chancery Reports (Kent's Decisions), published in seven volumes, cover a wide range of subjects and furnish the basis of equity jurisprudence. Kent's writings and decisions are classics in American law.

CHAPTER XXIX

DRAFTS

171. INTRODUCTION

172. DEFINITION

173. THEORY OF DRAFT

174. ACCEPTANCE

- 1. Kind of Acceptance
- 2. What an Acceptance Acknowledges
- 3. Quasi Acceptance
- 4. Acceptance for Honor
- 5. Trade Acceptances

175. LIABILITY OF PARTIES

176. SET OF EXCHANGES

177. TIME

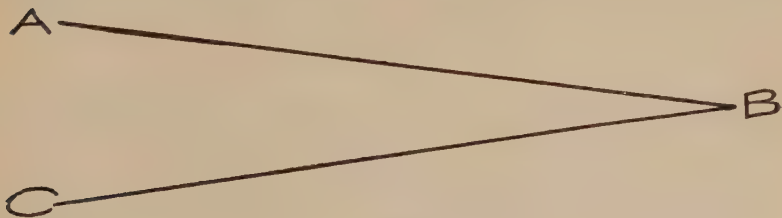
178. NON-ACCEPTANCE OR NON-PAYMENT

179. PROTEST

180. NOTICE

181. QUESTIONS ON TEXT

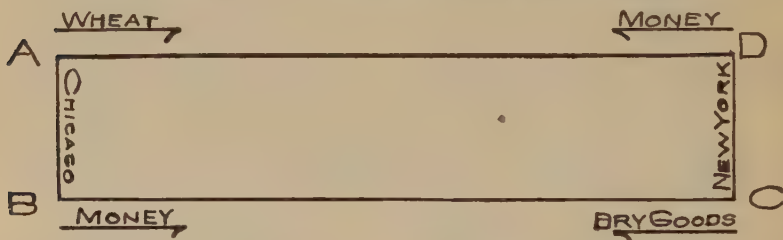
171. Introduction. A draft is the oldest of the many kinds of negotiable instruments, having been used by the Hanseatic League in making payments for goods. For example, A, of one city,



owes B, of another, who in turn owes C, of the former city. In order to save the necessity of transmitting the money between these two places, B directs A to pay the amount due him to C and thus cancels all the indebtedness between these parties.

Again, for example, there is no money due in Chicago from New York or the reverse. The following deals then take place:

A, of Chicago, ships 100,000 bushels of wheat at \$1.00 a bushel to D, of New York. B, of Chicago, buys \$100,000 worth of dry



goods from C, of New York. As the deal now stands there is \$100,000 due to Chicago from New York and the same amount due from Chicago to New York. By means of a bill of exchange the banks of the two cities are able to settle the accounts without the use of money. B buys at the bank a draft on New York which he mails to C, who sells it to his banker. D buys at the bank a draft on Chicago which he mails to A, who sells it to his banker, and the accounts are again all in balance without the use of any money.

172. Definition. A draft is an order by one person on a second person to pay a certain sum of money to a third person. These parties are respectively known as drawer, drawee, and payee. The draft is frequently designated a Bill of Exchange or simply Exchange.

173. Theory of Draft. The theory of the draft is that the drawer has funds belonging to him in the hands of the drawee, and therefore has the right to direct payment.

Drafts are issued payable at sight or a certain time after sight, and are known as sight or time paper. They are also called for-

eign or inland. Foreign, if the parties are residing in different countries; inland, if they live in the same country or State. A draft drawn in Springfield, Illinois, and payable in Pittsburgh, Pennsylvania, is a foreign instrument.

SIGHT DRAFT OR BILL OF EXCHANGE

NO PROTEST TEAR THIS OFF BEFORE PRESENTING

	\$500.00	Ada, Ohio, March 4, 1925
	At sight	
Pay to the order of W. P. Slocum		
Five Hundred		Dollars
Value received, and charge the same to account of		
To E. M. Lamson	} M. Phlips	
No. 15 Phoenix, Arizona		

174. Acceptance. If a draft reads "payable after sight" it is not due and payable until the expiration of the time specified. "At sight" means after seen by the drawee, not after date of issue. Therefore the draft must be presented to the drawee to

AN ACCEPTED DRAFT

	\$600.00	Salem, Oregon, April 6, 1925
	At thirty days sight	
Pay to the order of Brown, Smith & Company		
Six Hundred		Dollars
Value received, and charge the same to account of		
To R. Y. Wallace	} E. E. Brown & Co.	
No. 86 Ferris, California		

determine his willingness to pay, and if he refuses, the draft is said to be dishonored. If he is willing to pay when due, he signifies his willingness to do so by writing his acceptance across the face of the draft. He now is held to the same promise as that of the maker of a note. He is under no obligation to accept even

though he owes the drawer. After acceptance he is absolutely bound to pay.

1. *Kind of Acceptance.* The payee or holder of a draft, who presents it to the drawee for acceptance, has a right to an unconditional acceptance. In fact, if he should permit the drawee to give him a qualified acceptance, the act would release the drawer from all liability. To condition the draft in regard to amount, a change in time of payment, or a change in the place of payment, would be sufficient to release the drawer from his usual conditional liabilities; as, "accepted provided I have received sufficient funds": "accepted provided proceeds of sales of shipment are great enough."

2. *What an Acceptance Acknowledges.* An acceptance once made acknowledges the genuineness of the drawer's signature, the capacity of the drawer to make the draft, his existence, and his authority to draw for the amount. Also, if the draft was to the payee's order, that the payee is competent to indorse.

3. *Quasi Acceptance.* There are several somewhat irregular acceptances or conditions that may amount to an acceptance. If the drawee holds the draft for an unreasonable length of time, or refuses to give it up, he is deemed an acceptor. The drawee may desire to attach a conditional acceptance, as when he accepts conditioned upon receipt of sufficient funds. The holder may refuse such acceptance. If he receives it he thereby releases those previously liable as they understood that the drawee would give an absolute acceptance. An acceptance may be given directing the holder to some third party for payment. This is not a usual acceptance in this country. The acceptance is called "in case of need," and is given after the paper has been dishonored.

Again, an acceptance may be in writing, as in a letter which properly describes the papers. It is an undertaking or promise to accept a draft.

4. *Acceptance for Honor.* If a bill is presented to the drawee for acceptance and it is dishonored through his refusal to accept it, a friend of some previous party, generally the drawer, may offer to save the credit of the bill by accepting the paper for the honor of the drawer or some other particular party. This is done by writing across the face of the draft "accepted for the honor

of” and signing it. This acceptance is sometimes designated an acceptance *supra protest*; the holder is not obliged to accept this kind of an acceptance but may proceed to collect against those who were conditionally liable.

A draft with an acceptance for honor matures from the date of dishonor rather than from the date of acceptance. There may be several acceptances for honor of the same paper.

The theory of this acceptance is that it gives the drawer an opportunity to take care of the bill at maturity by placing funds

AN ACCEPTANCE FOR “HONOR”

\$350.00 St. Louis, Mo., June 15, 1925
 At twenty days sight Pay to
 the order of J. Luce and Company
 Three Hundred Fifty- Dollars
 Value received, and charge the same to account of
 A. W. Chase Wm. Quinn & Co.
 126 Boston, Mass. R

in the hands of the drawee, or otherwise providing for the payment of the paper to be presented. The liability of an acceptor for honor differs from that of an ordinary acceptor in that he is only conditionally liable. When the draft matures it must be presented to the drawee for payment, and if again dishonored is again protested. This time the acceptor for honor is notified of the dishonor after which he becomes absolutely liable, like all parties conditionally liable. If the acceptor for “honor” should dishonor payment the draft must again be protested.

5. *Trade Acceptance.* This is a new form of draft that has been introduced through the creation of the Federal Reserve Bank. It is drawn against a sale of merchandise or actual commercial transaction, that is, for agricultural, industrial, or commercial purposes. This instrument may be discounted at the customer’s bank and when indorsed by a member bank with a waiver of demand, notice and protest may be rediscounted by a Federal Reserve Bank,

providing the maturing of such paper may not be more than ninety days for commercial paper or not more than six months for agricultural paper.

Definition. A trade acceptance is defined as "A draft or bill of exchange drawn by the seller on the purchaser of goods sold, and accepted by the purchaser."

FORM OF TRADE ACCEPTANCE

TRADE ACCEPTANCE		Due <u>Aug. 1, 1922</u>
No. <u>47296</u>	New York, N. Y. <u>May 1, 1922</u>	\$ <u>1,000.00</u>
after <u>Sight</u> pay to the order of <u>OURSELVES</u>		
		Dollars
The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase. The drawee may accept this bill payable at any bank, trust company or banker's office in the United States which he may designate.		
To <u>John D. & Co.</u>	(City) <u>New York</u>	(Signature of drawer) <u>Richard Lee & Co.</u>
(Name of drawee)	(Street and street)	(Signature of drawer)
Date <u>May 1, 1922</u>	(City) <u>New York</u>	
(Date)	(City)	

Courtesy of the Guaranty Trust Co., New York City

175. Liability of Parties. The drawer presumably has funds belonging to him with the drawee and desires to collect by transferring a claim for the amount named to the payee. The drawer is conditionally liable; the drawee assumes no liability until he signifies his willingness by paying or accepting the draft. After acceptance his liability is absolute, the same as the maker of a note. The payee must present the draft within a reasonable time. He may transfer his right either before or after acceptance and assume the liability of an indorser.

176. Set of Exchanges. One of the means adopted to insure prompt presentment and payment was to draw the draft in sets, duplicates or triplicates, and to send each by a different route, the first one received to be acted upon, the others to be void. Each draft properly describes the accompanying parts so that no misunderstanding can occur that may lead to the belief that each

is a complete instrument. The present transportation is so sure and prompt that sets of exchanges are not as frequently used as in the days of the stage coach and sailing ships.

FIRST BILL OF A SET OF EXCHANGE

Exchange for £ 85-4-7. 5tg Sixty	Chicago, June 14, 1825.
Pay to the order of Conrad Barker & Co. for Eighty-five pounds 4/7 Sterling	
To J. Glossop & Co., Ltd. 32 Middleborough St. London	
L. B. Armstrong	

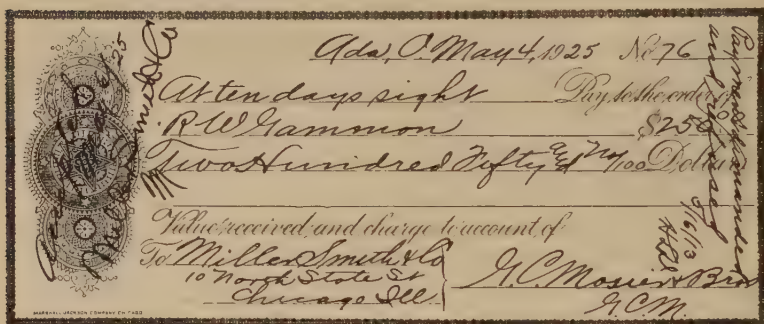
In the above form the part in parenthesis is a description of the other parts of the set. The paper may be negotiable as an ordinary draft, but care must be exercised, as a fraudulently disposed person might negotiate each of the parts to several innocent parties.

177. Time. The holder of an unaccepted draft must observe the following: How, when, where, and to whom must presentment for payment or acceptance be made. First, the presentment must be by an exhibit of the paper to the drawee or his agent, with demand for payment or acceptance. Second, the paper must be presented within a reasonable time. What is a reasonable time depends on circumstances. This has reference both to the time of day and to the length of time the paper may be kept. Third, the drawer by giving the address of the drawee must be satisfied with presentment at that place. Reasonable effort must be made to find the drawee.

178. Non-Acceptance or Non-Payment. When the drawee refuses to accept a time draft, pay a sight draft, or pay an accepted

draft, it is said to be dishonored. The parties absolutely liable continue so liable until they are excused by the due cancellation of the instrument; but to fix the liability of those secondarily liable, certain steps must be taken to change their liability from secondary or conditional, to primary or absolute, in order to enable the holder to take advantage of the provisions of the law of merchants; i.e., the holder protests against the non-acceptance or non-payment.

"ACCEPTED DRAFT" PROTESTED AND NOTED



179. Protest. This is a formal declaration made in order to furnish the parties secondarily liable with the evidence of the dishonor of the particular paper. This evidence is furnished by an official known as a Notary Public. All foreign papers, notes, checks, drafts, etc., that are dishonored must be protested if it is intended to hold those who are secondarily liable. It is not necessary to protest inland paper unless so required by statute. The notary personally presents the paper, and notes thereon the dishonor, and later makes out the official statement, called a protest, a specimen of which is shown on pages 183 and 184.

180. Notice. All parties conditionally liable must be notified in case of dishonor of paper. The holder may notify in case of inland paper, but in case of foreign paper the notice is sent by the notary making the protest. The following is a proper notice:

United States of America, }
 State of New York, } ss:
 City of New York,
 County of New York

On the first day of June 1925

at the request of Nathaniel Clapp
 I, Leonard L. Thompson a Notary Public of the State of New York,
 duly commissioned and sworn, dwelling in New York City did
 present the original Bill of exchange hereunto annexed,
 to Henry Jennings
 at 42 Broadway, New York, N. Y.

and demanded payment thereof, which was refused

Whereupon I, the said Notary, at the request aforesaid, did **Protest**, and by these presents
 do publicly and solemnly **Protest**; as well against the Drawer and Endorsers of the said
Bill of exchange as against all others whom it doth or may concern, for exchange,
 re-exchange and all cost, damages and interest already incurred, and to be hereafter incurred for want of
payment of the same.

Thus Done and Protested in the City of New York, aforesaid, in the presence of
 John Doe and Richard Roe, witnesses,
 IN TESTIMONIUM VERITATIS,
Leonard L. Thompson
 Notary Public.

United States of America, }
 State of New York, } ss:
 City of New York,
 County of _____

I, Leonard L. Thompson a Notary Public of
 the State of New York, duly commissioned and sworn, do hereby Certify
 that on the first day of June one thousand

nine hundred and twenty-five due notice of the presentment and protest of the said Bill of exchange
 after demand and refusal of payment thereof, by notice, partly written and partly printed, signed by me, was
 given by me to the drawer and _____ respective endorsers of the said instrument, by depositing the same
 in the Post Office at New York, N. Y. (prepaying the postage thereon), duly
 directed and superscribed to said drawer and
 endorsers, as follows, to wit: To Henry Jennings, 42 Broadway, New York, N. Y.

Herman Muller, 11 Broad Street, New York, N. Y.

Arthur Jones, 80 Boylston Street, Boston, Mass.

Carl E. Reed, 127 Tremont Street, Boston, Mass.

to above named places being the reputed places of residence of the persons to whom such notice was
 so addressed, and the Post Office nearest thereto.

SEAL

In Testimony Whereof, I have hereunto set my hand and affixed my
 official seal at the City County, and State of New York

Leonard L. Thompson
 Notary Public.

NOTICE OF PROTEST OF NOTE

STATE OF ILLINOIS. }

COUNTY OF Cook

} SS.

Chicago, Ill., May 16 19 25

SIR:

A draft for \$ 250.00Dated May 6, 1913Payable May 16, 1913Signed by Miller, Smith & Co.Endorsed by R. W. Gammon, and Lee McCalladrawn by G. C. Mosier & Bros.

*Being this day due and unpaid, has been by me
PROTESTED for non-payment, and I hereby notify
you that the payment thereof has been duly de-
manded, and that the holders look to you for pay-
ment, damages, interest and costs.*

Done at the request of A. A. Brewerthe holder

Notary Public.

To G. C. Mosier & Bros.Ada, Ohio

181. QUESTIONS ON TEXT

What is a draft? Illustrate its use with three parties. With four parties.

What is the theory of a draft? What is an acceptance? When necessary and when not?

Name the parties to a draft and state the liability of each.

What is an acceptance for honor? Compare the liability of such an acceptance with that of a regular acceptor.

Illustrate several somewhat irregular acceptances. May an acceptance be on a separate sheet of paper? May it be given before the draft is drawn?

Explain a set of exchange. Why not so frequently used now? What care must be exercised in their use?

Explain holder's duties as to how, when, and where to present for acceptance.

What is non-acceptance or non-payment? And what must be done by the holder?

What is a protest? And when necessary? What is notice? And how given?

CHAPTER XXX

CHECKS

182. INTRODUCTION

183. DEFINITION

1. Use
2. Post-Dated or Ante-Dated
3. Parties

184. WHEN TO BE PRESENTED

185. CERTIFICATION

186. CERTIFICATE OF DEPOSIT

187. CASHIER'S CHECK

188. BANK DRAFTS

189. DOCUMENTARY BILLS

190. VOUCHER CHECKS

191. FORGERY

192. PASS BOOK

193. QUESTIONS ON TEXT

182. Introduction. The business man deposits his money with a bank for several reasons. It is a safe place to keep it, he may receive interest on the deposit or on a part of it, it is ready for him at any time, and by means of an order on the bank the money or any part of it may be transferred to another person.

The right to draw is based on the fact that credit is presumably obtained at the bank by becoming a depositor. To become a depositor, an introduction to the bank is usually obtained and the funds one desires to deposit are listed on a deposit slip and passed in to the teller, who enters the amount in a pass-book which the depositor keeps as a receipt for his deposit. A credit

is now established, also the right to issue checks against the amount deposited. As checks are presented and paid by the banker they are at once charged against the depositor's account. These checks are also stamped "paid," and at stated intervals the account is written up and cancelled checks are returned to the depositor bearing the payee's indorsement, thus becoming receipts.

Two general methods of depositing are recognized; one, a commercial account against which checks may be drawn, and one, a savings account against which checks are not to be drawn. In the first, money is withdrawn by means of a check, and in the second, by presenting the pass-book and having the amount withdrawn entered.

183. Definition. A check is a written order by a depositor on his banker to pay a certain sum of money to another. There are three necessary parties to a check, the maker called "drawer" (who is the depositor), the drawee, or banker, and the payee (the one to whom the check is made payable). The drawer may also be the payee. Statutory laws frequently charge fraud or obtaining money under false pretense if the drawer of a check has no funds in the bank or is not a depositor.

17-9 THE BANKERS NATIONAL BANK 17-9

MINNEAPOLIS, MINN. March 28th 1921 No. 873

NO SPACE HERE

PAY TO THE ORDER OF John W. Simpson \$87⁰⁷

Eighty Seven & 07/100 DOLLARS

NO SPACE HERE

ADD LINES (2) TO FILL OPENINGS ABOVE

SLANT

Geo. W. Smith

BANKERS SUPPLY CO. CHIC.

Form of a correctly drawn check. Used through the courtesy of the Bankers' Supply Company, Chicago, Illinois.

In the above check Geo. W. Smith is drawer, John W. Simpson the payee, and The Bankers National Bank is the drawee.

A check is subject to the usual requirements of negotiable paper; it is an order, it must be drawn on a bank or banker, it purports

to be drawn against a deposit, it must designate a payee, it must be for the payment of a certain sum of money, it is not entitled to days of grace, and it should be dated.

1. *Use.* The check is one of the chief instruments of payment; it affords ready means of transferring money from one account to another. The check is intended for immediate use. If a check is payable to bearer, no indorsement is necessary, although an indorsement is usually demanded more as a means of furnishing evidence than of holding the indorser liable. If a check is payable to order, bankers may require an identification and indorsement before payment.

2. *Post-Dated or Ante-Dated.* It is not material whether the check bears the present date, is post-dated, or is ante-dated. Post-dating is an everyday occurrence among business men. If the bank pays before the date named it does so at its peril.

3. *Parties.* Like a draft, a check has three parties: drawer, or depositor; drawee, or banker; and payee, or holder. The holder has no recourse against the drawer until presentment has been made. It is the duty of the drawer to have funds available for the prompt payment of the check. The holder must be prompt in presenting the check for payment, and must notify the drawer in case payment is refused so that the drawer may protect himself.

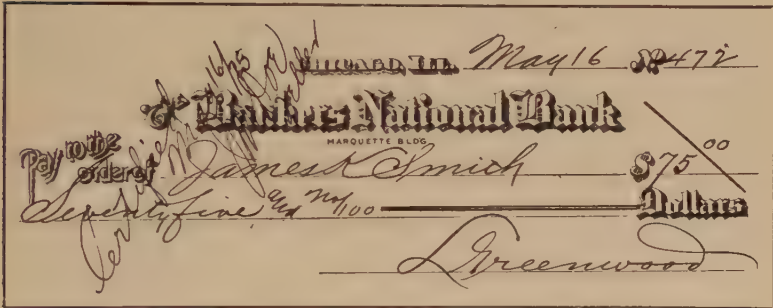
184. When to be Presented. Since checks are not for general circulation, they must be presented to the bank within a reasonable time, but circumstances alter cases. If the bank is in another city, then more time for presentation must be granted; the check must not be locked up, however. It must be started towards its destination, the bank, generally within twenty-four hours after its receipt. If all parties live in the same town, the check should be in the bank the following day or the drawer will be released so far as any loss may be concerned. If a check is put in circulation and more time is thereby consumed than the law allows the holder, the drawer is released, but not so as to the immediate indorser.

The above must not be construed so as to release the drawer of the check in case the delay does not injure him. Thus a check might not be presented for a year. This of itself would be no

cause for releasing the drawer. The delay must work an injury to effect a release.

185. Certification. Checks are not intended for extended circulation as are bills of exchange, yet business demands require this to some degree. If the banker signifies his willingness to do so a certification may be given, and then the check may be circulated subject only to the Statute of Limitations. The banker

CERTIFIED CHECK

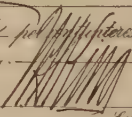


is therefore absolutely liable for the payment. Certification somewhat resembles an acceptance, but while there are some similar points, there are several points of difference. In the acceptance of a draft the drawee becomes absolutely liable, and the drawer remains conditionally liable. In the certification of a check the bank or banker becomes absolutely liable, while the drawer may or may not continue conditionally liable. First, if the certification of the check is at the solicitation of the drawer, then he continues liable; but if the request is made by the holder, the drawer is released from further liability; the holder may then only look to the bank for payment. By certifying a check the bank is precluded from denying the genuineness of the drawer's signature, but does not guarantee as to the body of the check or the indorsements. The teller, cashier, or president of the bank is the proper party to bind a bank by certification. The bank in effect says: "The signature of the drawer of this check is genuine, and if it

turns out to be forged it is our loss, not yours; the drawer has enough funds here to pay it, and we will retain the money and apply it for that purpose only, and should we fail so to do, we, nevertheless, will pay the check. But if it should develop either before or after the actual payment of the check that the amount has been fraudulently raised—either before or after our certification—we will pay only the amount it was originally issued for; and if we have paid more than the latter, you will have to make good the difference. Further, we have said and warranted to you that the signature of the drawer is genuine (that we are supposed to know); but we do not know anything about the genuineness of the signatures of the indorsers on the check, and you, in asking for this certification, or for subsequent payment thereunder, have said, in law, to us that the indorsers' signatures are correct, and if they are not that you will make good to us any loss by reason thereof." Certification then, admits three things: (1) That the signature of the check is good and genuine; (2) that the drawer has sufficient funds in bank to meet the check; (3) that the bank will retain the funds for the holder.

186. Certificate of Deposit. This is an instrument that acknowledges the receipt of a sum of money on deposit with a bank or banker. Checks cannot be issued against such a deposit. It is a negotiable instrument and usually draws interest. It is in legal effect a negotiable promissory note.

CERTIFICATE OF DEPOSIT

	BANK OF ROUND LAKE ESTABLISHED 1888		
	<i>\$750⁰⁰</i> <i>Twin Bridges, Montana, May 14 1925</i> <i>Temp Miller</i> has deposited in this Bank <i>Seven hundred and Fifty 00/100</i> Dollars <i>for 24 months</i> payable to the order of <i>himself</i> <i>on the return of this Certificate properly endorsed with six per cent interest</i> <i>per annum; no interest after maturity</i>		
<i>123784</i>		 Cashier	

187. Cashier's Check. This is a check issued by a banker drawn by himself on his own bank and is furnished to customers who wish to remit money to other than to one of the great money centers.

CASHIER'S CHECK

Continental and Commercial National Bank	
• of Chicago •	
	Pay to the order of <u>Chicago, June 26, 1925</u> No. 5109 <u>J. A. Adams & Co.</u> \$12 ⁷⁵ Twelve NOT OVER FIFTY DOLLARS <u>155</u> Dollars CASHIER'S CHECK  <u>Herbert Foster</u> Cashier

CHECK, DRAFT FORM

COUNTERSIGNED Pres. <u>Samuel Ramsey</u> Secy. <u>S. B. White</u>		THE SCHOOLMASTERS CLUB No. 1009	
		CHICAGO, ILLS. <u>May 4</u> 19 <u>25</u>	
		Pay to the order of <u>William B. Rosewell</u> \$ <u>60</u> <u>Sixty and no/100</u> ————— Dollars TO FORT DEARBORN NATIONAL BANK, CHICAGO, ILLS. } THE SCHOOLMASTERS CLUB _____ } <u>S. B. Whitney</u> Treasurer	

188. Bank Drafts. This is a form of negotiable instrument that is used for the purpose of making remittances. For example, New York and Chicago are money centers, and drafts are drawn by correspondent banks against banks in these centers. Practically all banks carry money on deposit with the banking centers. Our large banks carry credit with foreign banks to accommodate customers desiring to pay bills in foreign countries. London is one of the commercial centers of the financial world, and an importer in Chicago desiring to pay a bill due in Rio Janeiro will probably pay by a foreign exchange on London which he mails to his creditor in Rio Janeiro.

189. Documentary Bills. A documentary bill is one accompanied by the usual number of certificates relating to the title of certain goods; as, a New York importer purchases silk at Hongkong, China, on say, ninety days' credit. First, the importer has his New York banker secure a credit for the desired amount as an assurance that the draft will be accepted. His New York banker secures this through a London bank which so informs its correspondent bank at Hongkong. The following papers are made out: (1) a bill with consular certificate, (2) a bill of lading, (3) an insurance certificate. A draft to which are attached the above certificates is now drawn on the purchaser. The draft is discounted at some Hongkong bank and then forwarded to a London banker with the certificates. The papers are then forwarded to New York, where an acceptance of the bill is secured. The certificates are delivered to the acceptor of the draft. The latter may be rediscounted after acceptance. These drafts are drawn due as of a certain date. This makes the term of credit a definite time.

190. Voucher Check. This is a form of check that is increasing in popularity with business houses. In addition to an ordinary check there is a description of the particular account or item that is being paid. The account that is being paid is generally itemized and its distribution to a special account shown. The voucher

FORM OF VOUCHER CHECK

THE GREGG PUBLISHING COMPANY 20 WEST 47TH STREET	Guaranty Trust Company of New York		NUMBER 1998
	Fifth Avenue Office		
	PAID BY CHECK NEW YORK CASH ON HAND	New York	August 21, 1925
	Pay <u>FOURTY-SEVEN DOLLARS FIFTY CENTS</u>		Dollars
	to the order of		
	Stamp and Stationery Service 23 West 32d Street New York, N. Y.		\$14.50
	THE GREGG PUBLISHING COMPANY		
	FOR <u>Invoice August 10,</u>		<i>Deland Siles</i> FOR THE PRESIDENT

check is thus a complete receipt in that its indorsement and circulation acknowledges a receipt of the amount of money and also its application to a particular debt or account. An ordinary check is but an acknowledgment of a payment of a certain sum. The voucher check generally bears several signatures and is issued in a variety of forms, some simple and others complex.

191. Forgery. Forgery consists "in fraudulently making or altering any writing, to the prejudice of another's rights." Usually forgery is committed by signing another's name, as in indorsing a check that the forger has found or stolen. Where one signs his own name to an instrument but passes it as the instrument of another party of the same name he is guilty of forgery. The use of an assumed name is not forgery unless it is done with the intent to defraud.

To constitute forgery in the making of an instrument two things must be present. First, the writing must appear to create a liability, and, second, there must be a fraudulent intent.

Any material alteration of a completed instrument whereby one's responsibility is increased is forgery, but the correction of the language where ungrammatical is not forgery. Since delivery is the final essential element to a negotiable instrument, so the forgery is not completed until delivery is made.

Where one adopts as his own a signature that is forged, it has generally been held that he assumes the liability of such party. The acceptor of a draft is estopped from denying the genuineness of the drawer's signature. One who issues paper is a guarantor of the genuineness and capacity of the previous parties.

In order to guard against forgery and fraud, the banker requires the drawer of a check to leave his signature with the banker when he becomes a depositor. This is to afford the banker an opportunity to compare signatures. The highest courts of the country have laid down the following rule: "The maker of a check is obliged to use all due diligence in protecting it; the omission to use the most effectual protection against alteration is evidence of neglect which renders him responsible for the fraudulent amount, the bank being liable only for genuineness of the signature, and ordinary care in paying the check." "When the

drawer has drawn his check in such a careless and incomplete manner that a material alteration may be readily accomplished without leaving a suspicious appearance, he himself prepares the way for fraud, and if it is committed, he, and not the bank, should suffer."

192. Pass Book. A pass book given to a depositor of a savings account is not negotiable. The pass book rights may be assigned to another person who acquires the rights of his assignor against the bank and subsequent assignees. The book and assignment should be forthwith transmitted to the bank as a protection against subsequent action on the part of the assignor or creditors. (See Case No. 43.)

193. QUESTIONS ON TEXT

What is a check? Illustrate its use. Explain post-dating. Name the parties to a check and compare with parties to a draft. When must a check be presented?

What is certification? What difference does it make if procured by the drawer or a holder? Why this distinction? What three things does it admit?

What is a certificate of deposit? How does it differ from an ordinary deposit?

What is a forgery? What effect has alteration on one's liability? What two things must be present to constitute forgery?

What is a voucher check? What is a cashier's check? What is a pass book?

CHAPTER XXXI

ESSENTIALS OF INDORSEMENTS

194. INTRODUCTION

195. KINDS OF INDORSEMENTS

1. Blank
2. Full
3. Restrictive
4. Qualified
5. Conditional
6. Waiver
7. Guarantee
8. O. K.

196. SEVERAL INDORSEMENTS

197. THE INDORSER'S CONTRACT

198. QUESTIONS ON TEXT

194. Introduction. The essential part of an indorsement is the signature of the indorser. The usual signature of the indorser should be given. If the name of the payee is incorrectly spelled, the indorser should write it as given and then follow it by his proper signature, also indicating that both signatures are in fact but one. Any writing showing the intent of the indorser is sufficient. Whatever extra writing is used other than the signature must be words of transfer or the special character of the indorser's contract. In conclusion, the indorsement must be by the payee, his agent, or subsequent holder, and must follow the tenor of the instrument. It accomplishes two things—it transfers the title, and it carries with it the law merchant liability of the indorser. The indorsement should be written crosswise on the back of the paper—the first one at the left end, the others in order.

The law merchant does not permit of a partial indorsement. The indorsement is completed by delivery.

195. Kinds of Indorsements. There are several kinds of indorsements; viz., blank, full, qualified, restrictive, conditional, waiver, guarantee, and O. K. The first two are in general use, the others are not so frequently used.

1. *Blank.* This indorsement consists simply in writing the signature of the indorser on the back of the paper. A blank space should be left above the signature. The instrument is now payable to bearer, as the holder's name is not designated. If lost or stolen, it might be put into circulation to the loss of the proper owner. The paper may now be passed from hand to hand by mere delivery; however, an indorsement should be demanded, for each indorser adds credit to the instrument. If no indorsement is required, the transferrer assumes only the common law liabilities which extend to the receiver only. (See (b) III. or 2.)

2. *Full.* An indorsement in full includes the names of both the indorser and the indorsee. Negotiable words are not necessary. If the instrument is negotiable it will continue so until the words expressly denying this appear in some indorsement. Blank indorsements may be filled out and thereby become indorsements in full. Writing may be added to an indorsement provided it does not change the liability of the indorser. If there are several indorsements in blank, the last holder may make any indorsement, one in full, and reject the following ones; or he may fill out each one so as to show a record of full indorsements from the payee to the present holder. An indorsement in full cannot be changed by a subsequent party to one in blank. Blank and full indorsements are known as absolute indorsements. The liability of the indorser is subject to demand and to the usual protest and notice of the same. (See (a) III. or 1.)

3. *Restrictive.* If the holder desires to transfer, yet wishes to restrict the circulation of the paper, it may be accomplished by showing such intention in his indorsement. The usual form is to name the indorser and use the word "only." The object of such an indorsement frequently is to vest the title in one for the benefit of a third person, or to show that the indorsee is simply an agent of the indorser. Any subsequent transfer would be subject to the law of assignability. (See (h) III.)

4. *Qualified.* In this indorsement the indorser escapes the lia-

bility as known to the law merchant, in that he does not guarantee the payment of the paper. He cannot thus escape the common law liability. The usual form is to include the words "Without recourse," written above the indorser's signature. The indorsement may be either in full or in blank. If one holds a note secured by a mortgage and wishes to negotiate the note, he generally uses the qualified indorsement, as the mortgage is sufficient security. (See (g) Ill. or 7.)

5. *Conditional.* In a conditional indorsement the holder parts with possession, but does not pass a full title to the indorsee. The condition may be either precedent or subsequent: as, "Pay to A when he arrives at 21 years of age;" "Pay B unless I give you notice not to pay." (See (f) Ill. or 6.)

6. *Waiver.* An indorsee may not desire to accept a transfer of the instrument unless the indorser is willing to waive some of the requirements incident to making the liability of the indorser absolute, and, if so, he demands a waiver indorsement. The usual form is, "Demand, protest and notice waived", following this with his signature. The object is to avoid the necessity of protesting. (See (c) Ill. or 3.)

7. *Guarantee.* This is an indorsement frequently given, in which the indorser guarantees the prior indorsements. It is generally used by banks. (See (i) Ill. or 9.)

8. *O. K.* This is an indorsement of identification. A receives a check from B. If A is not acquainted at the bank and has no means of furnishing identification, he asks B to O. K. the check. B does this by writing the letters O. K. above his signature on the back of the check. Any one may now secure the money from the bank, but he is requested, however, to indorse the name of

SAMPLES OF BANK INDORSEMENTS

PAY TO THE ORDER OF
ANY BANK OR BANKER
PRIOR INDORSEMENTS GUARANTEED

JAN 30 1925

FIRST NATIONAL BANK

63-26 TAMPA, FLA. 63-26

Pay ANY FEDERAL RESERVE BANK
—OR ORDER—

FEB 19 1925

FEDERAL RESERVE BANK

1-120 OF NEW YORK 1-120
PRIOR INDORSEMENTS GUARANTEED

the payee on the check. This is not an indorsement of transfer. It is made by the maker of the check as a means of identification. (See (j) Ill. or 10.)

INDORSEMENTS



196. Several Indorsements. *Forms.* Each indorser adds his conditional liability to the bill which accrues to the benefit of all subsequent holders unless he makes use of a qualified indorse-

ment. In case of a refusal to pay on the part of the one absolutely liable, as the maker of a note, the holder may proceed against any prior indorser. So far as an innocent holder is concerned the indorsers stand in the order in which their names appear on the instrument. As between two mediate parties who are indorsers the one that appears to be second may in fact be first and it may be shown as between themselves.

197. The Indorser's Contract. The indorser's contract includes provisions from both the law merchant and the common law. The law merchant liability resulting from an indorsement is conditional. The common law liabilities are absolute.

First, when one indorses an instrument two results are effected—a transfer of title in the instrument, and the assuming of conditional liability. In substance the indorser in writing his signature says, "Here is the evidence of my title to this instrument," and the law merchant says for him, "I will pay if the maker does not."

Second, the common law says for him that the instrument is what it purports to be; that he has a lawful title to it; that it is genuine, and that the parties to the contract are competent.

The one who transfers an instrument payable to the bearer, or indorsed in blank, without indorsement assumes only the common law liability and that extends but to his own transferee likewise.

The one who uses an indorsement "without recourse" assumes the common law liability.

The method of changing the conditional liability of the indorser to absolute liability is discussed under demand and notice.

(U. N. I. A.) A person secondarily liable on the instrument is discharged:

- (1) By any act which discharges the instrument;
- (2) By the intentional cancellation of his signature by the holder;
- (3) By the discharge of a prior party;
- (4) By a valid tender of payment made by a prior party;
- (5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
- (6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the

instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such a party is expressly reserved.

198. QUESTIONS ON TEXT

What is an indorsement? What does it accomplish? Name the different kinds of indorsements. What ones are in general use? What is a blank indorsement? What risk is assumed in holding or mailing paper with such an indorsement?

What is a full indorsement? What may be done where blank indorsements appear? What is a restrictive indorsement? When used? What is a qualified indorsement? When used? If liability is evaded by its use why not use it always? What is a conditional indorsement? Explain its use. What is a waiver indorsement? Its object? What is a guarantee indorsement? Its object? What is an O. K. indorsement? How used?

To whom is an indorser liable? Discuss the law merchant and the common law liability of the indorser.

Why should an indorsement always be demanded when one receives negotiable paper?

CHAPTER XXXII

CONDITIONS OF TRANSFER

199. INTRODUCTION

1. Transfer in Good Faith
2. Transfer in Usual Course of Business
3. Transfer for Value
4. Transfer Before Maturity

200. STOPPING PAYMENT

201. QUESTIONS ON TEXT

199. Introduction. Negotiable paper since its inception has afforded safe and ample means for the purpose of transferring values between traders. The indorsement is the usual means of showing the intention of the indorser to transfer title to the indorsee. The law merchant recognizes certain well-defined conditions as precedent to the transfer of title to another. If these conditions have been complied with, the indorsee gets a complete title. It frequently occurs that the purchaser has a better title than the seller. All conditions affecting the standing of the instrument, when interpreted as between the original parties, cease when a proper transfer has been made. Negotiable paper is "a courier without baggage." The conditions of the transfer are as follows: (1) Transfer in good faith without notice; (2) Transfer in the usual course of business; (3) Transfer for value; and (4) Transfer before maturity.

1. *Transfer in Good Faith.* In order to transfer a perfect title the utmost good faith must exist between the parties. The purchaser must have no notice, either actual or constructive, of any irregularity or lack of consideration existing between the original parties. If the note was lacking in consideration between the original parties, the purchaser would take the paper subject to these conditions if he had notice. If the note was one of a series,

so indicated, a purchaser of one of the notes not yet due would not be a purchaser in good faith if he knew that one of the series was due and not paid. Likewise, the purchaser of a note on which an interest payment is due and unpaid would not receive full protection. Such paper is subject to defenses.

If notice is had subsequent to acquiring title, it will not affect the holder's rights. After a transfer has been made *bona fide* and title is fully acquired, all defects are cured and a subsequent transferee acquires full title, notwithstanding he has notice.

Statutory enactment has provided that notice of the character of the consideration of a negotiable instrument may be conveyed to the purchaser as follows: "given for a patent right," or "given for a speculative purpose." This may be written or printed across the face of the instrument and all who acquire it take it subject to such defenses as may exist. (See Cases Nos. 41 and 44.)

2. *Transfer in Usual Course of Business.* The second element of transfer is that the transfer must be effected in the usual course of business. A purchaser for value is usually considered to be one who acquires title in the usual course of business. The term "usual course of business" means "according to the usages and customs of commercial transactions." A title acquired by legal process is not so acquired. It is subject to equities existing against the holder from whom the title was taken. (See Case No. 45.)

3. *Transfer for Value.* This expression means the taking of title for a valuable consideration. The term "valuable consideration" comes from the common law, and in the law merchant is subject to the same tests as at common law. The holder of paper as collateral security is a holder for value to the extent of his lien so as to enable him to defeat equities existing between the original parties. An eminent jurist lays down the doctrine that receiving collateral in payment, or as security for a preexisting debt, is receiving it for a valuable consideration. "Thus it may pass, not only as a security for new purchases and advances made upon the transfer thereof, but also in payment of, and as security for, the preexisting debt. In this way the creditor is enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights.

The debtor also has the advantage of making his negotiable securities of value equivalent to cash. Otherwise, the discounts, by banks, of negotiable securities are restricted, and credit and circulation of negotiable paper hampered." This is the general view throughout the country, with the exception of a few States. (See Case No. 46.)

4. *Transfer Before Maturity.* Negotiable paper is presumably payable at its maturity, and if not paid then it is open to suspicion. If equities are available against the present holder, they will be available against any subsequent holder who obtains title after maturity. If, however, a holder, in good faith, intervenes before maturity, then a subsequent holder, although after maturity, will take the latter's rights. Likewise, after an instrument has been dishonored, protested and notices sent, it may be put into circulation by an indorsement. (See Case No. 47.)

200. Stopping Payment. The receipt of a check by a payee does not give the holder any claim against the drawee; in other words, the issue of the check does not work an assignment of so much of the drawee's funds with the banker. The drawer may direct the drawee to dishonor or refuse payment of the check issued. This is called stopping payment; however, it is at the risk of the drawer for damages.

201. QUESTIONS ON TEXT

What are the conditions of transfer? What is "transfer in good faith"? Illustrate.

What is the effect if one receives paper knowing that full consideration was not given? Does it make any difference if notice is received before or after acquiring the paper?

Explain "transfer in the usual course of business." Give illustrations. Would receiving the paper from a notorious gambler have any effect on your title? Explain fully.

Explain "transfer for value." Illustrate. Would receiving a note at a discount be receiving it for value? What if the discount was as great as fifty per cent? When must the transfer be made to be fully within the provisions of the law merchant?

How may one receive paper after maturity and still have a good claim against a set-off?

CHAPTER XXXIII

ADDITIONAL CONTRACTS

202. INTRODUCTION

203. LETTERS OF CREDIT

1. How Used

204. TRAVELER'S CHECK

205. BONDS

206. WAREHOUSE RECEIPTS

1. How Used

207. BILLS OF LADING

1. How Used

208. NEGOTIABILITY

209. QUESTIONS ON TEXT

202. Introduction. Business necessity has contrived and put into use a number of contracts that are sometimes classed as quasi-negotiable. These contracts have not been afforded full negotiability largely because business necessity does not require it. The chief ones are letters of credit, bonds, warehouse receipts, and bills of lading.

203. Letters of Credit. A letter of credit is an instrument somewhat similar to a draft. It is payable at the convenience of the purchaser, and in the currency of the country where payable, but it is not primarily for negotiation. It is largely used by travelers

1. How Used. For example, A wishes to travel in Europe. To take the currency (gold) of this country would subject him to the inconvenience of carrying it, to say nothing of liability to loss. Again, if required to change this currency to the currency of the country where he happens to be traveling, he would be charged with the exchange each time. Instead of doing this, he

goes to his banker, before leaving home, and buys a letter of credit. This letter is directed to, and payable at different banks

LETTER OF CREDIT

£1000*
CIRCULAR
LETTER OF CREDIT

This Credit is in force until
June 1st 1925



No 9125
L 1,000 *#* Stg

Illinois Trust & Savings Bank
Gentlemen:

Chicago June 1st 1924

We will, serve to, introduce, to, you
Mr. John Doe *in, whose*
favor, we, beg, to, open, a, credit, with, you, collectively, for, the, sum,
of One thousand *Pounds Sterling,*
to, which, extent, be, pleased, to, furnish, payments, or, sums, as, required,
inscribing, the, amounts, so, paid, on, the, back, of, this, letter.

In, reimbursement, you, will, make, - first - *sight, draft, on,*
The Union of London & Smiths Bank, Ltd, London, Eng, inserting, therein, the, Date, and
Number, of, this, credit, which, we, &, our, agents, shall, meet, with, due, honor

Your, charges, are, to, be, paid, by, the, bearer, hereof
This, letter, must, be, returned, with, the, last, Draft
Recommending, Mr. Doe *to, your, usual, courtesy*
We, remain, Gentlemen
Your, obedient, servants,
Arthur Mann
Cashier

To, Messieurs, the, Correspondents, of, the,
Illinois Trust & Savings Bank

EXCEEDINGLY IMPORTANT

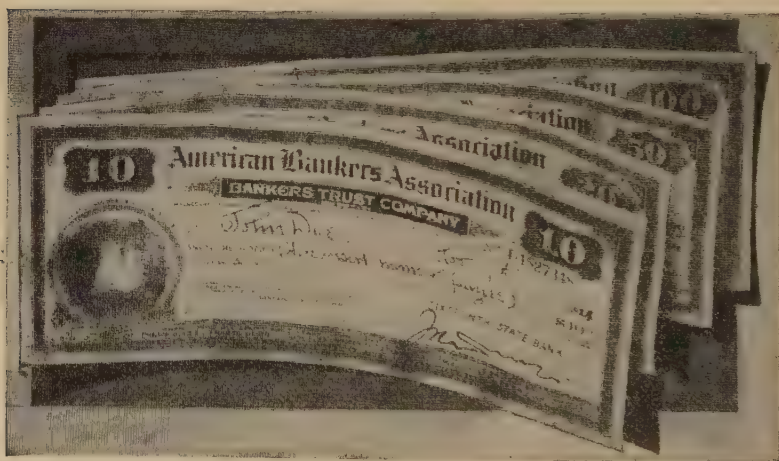
*N. B. The bearer is advised to keep the list of correspondents apart from the Letter of Credit to prevent their being lost or stolen together, also to affix IMMEDIATELY his own signature at place indicated on the inside of the cover of the list of correspondents as a precaution against forgery in the event of the list of correspondents or Letter of Credit falling into improper hands. The Illinois Trust and Savings Bank will not be responsible for the consequences arising from an omission by the bearer to observe these precautions.

in the several countries he intends to visit. In the course of his journey and as he desires to use the money, he presents this letter

at a specified bank and asks for a certain sum of money. The payment will be indorsed on this letter, and from this each subsequent bank can readily determine the balance due.

204. Traveler's Check. At the present time it is quite customary for the traveler to make use of drafts for small amounts which he procures from his bankers or from express companies. These are generally known as travelers' checks. They are less formal than the letter of credit. These checks are negotiable. When paid they are paid in full.

TRAVELER'S CHECK



205. Bonds. A bond is an obligation in form and effect similar to an ordinary promissory note, but it differs in that the bond is under seal and under the law merchant is not negotiable. Its transfer is governed by statutory enactment, and according to the wording of the bond is negotiable or non-negotiable. Bonds are chiefly issued in case of money borrowed by a municipality or by a corporation. It is customary to provide a fund for the purpose of paying bonds when due. As a rule, bonds draw interest, payable periodically, the interest payments being evidenced by small notes known as coupons; as they fall due they are detached and collected.

FORM OF BOND

STATE OF IOWA.

No.

\$1000

TRI-CITY RAILWAY COMPANY

MORTGAGE FIVE PER CENT. GOLD BOND.

The Tri-City Railway Company, a corporation, duly organized and existing under the laws of the State of Iowa hereinafter called the Company, for value received, promises to pay to the bearer or in case of registration to the registered holder hereof, the sum of **ONE THOUSAND DOLLARS (\$1000)** in gold coin of the United States of America, of or equal to the present standard of weight and fineness on the first day of September, A.D. 1922, and also interest thereon in the meantime, from the first day of September, A.D. 1902 at the rate of five (5) per cent per annum payable semi annually, in like gold coin, on the first days of March and September in each year upon the presentation and surrender of the annexed coupons as they severally become due, at the office of the German Trust Company, in the City of Davenport, State of Iowa.

It is covenanted by the holder of this bond that no recourse shall be had for the payment of its principal or interest by the holder, officer or Director of the Company, either directly or through the Company, by virtue of any statute or by the enforcement of any assessment or otherwise.

This bond is one of a series of two thousand (2000) bonds numbered consecutively from one (1) to two thousand (2000) both inclusive each of the denomination of one thousand dollars (\$1000) and of the same date, tenor and effect, and all equally secured by the Mortgage and Deed of Trust of even date herewith duly executed and delivered by the Company and running to the German Trust Company of the said City of Davenport, Iowa as Trustee, all the real property, except certain unimproved land in Scott County, Iowa, particularly described in said Mortgage, personal property, property rights, ordinances and franchises now held or owned and which may hereafter be acquired by the said Company in the State of Iowa or Illinois.

The same shall pass legal delivery only by transfer on bond kept for that purpose at the office of said German Trust Company, Registrar. After a registration of ownership as to the principal thereof, notwithstanding hereon, no transfer shall be valid except upon said bonds unless the last preceding transfer be to the bearer. The coupons hereto annexed shall, in all cases, be payable to bearer, whether the bond itself is registered or not.

This bond shall continue subject to registration and to transfer to bearer at option of the holder. Each registration shall be evidenced by the memoranda of the Trustee upon the back hereof.

This bond shall not be valid and obligatory unless authenticated by certificate endorsed hereon by said German Trust Company, Trustee, that it is one of the bonds secured by the aforesaid Mortgage or Deed of Trust.

In Witness Whereof the Tri-City Railway Company has caused this bond to be signed by its President or Vice President and Secretary, and its corporate seal to be hereon affixed, and a fac simile signature of its Secretary to be impressed upon the coupon hereto annexed, on this first day of September 1922.

Tri-City Railway Company.

Attest.

Secretary

By

President.

BOND COUPONS

On the First Day of SEPTEMBER 1930	\$25 ⁰⁰
TRI-CITY RAILWAY COMPANY ***	
will pay to the bearer hereof TWENTY-FIVE DOLLARS in gold coin of the United States of America, of the present or an equal standard of weight and fineness, at the office of the GERMAN TRUST COMPANY, in the City of Davenport, Iowa, upon the surrender of this coupon, being the interest due on that day on its Mort- gage Five Per Cent Gold Bond of Sep- tember 1st, 1902.	
No 40	Jas. F. Lardner, Act. Secretary.

On the First Day of SEPTEMBER 1925	\$25 ⁰⁰
TRI-CITY RAILWAY COMPANY ***	
will pay to the bearer hereof TWENTY-FIVE DOLLARS in gold coin of the United States of America, of the present or an equal standard of weight and fineness, at the office of the GERMAN TRUST COMPANY, in the City of Davenport, Iowa, upon the surrender of this coupon, being the interest due on that day on its Mort- gage Five Per Cent Gold Bond of Sep- tember 1st, 1902.	
No. 30	Jas. F. Lardner, Act. Secretary.

[Usually attached to Bond Certificates.]

WAREHOUSE RECEIPT

Chicago & Cincinnati Elevator and Annex No. 4*Chicago, Ill., June 12, 1925.**Received in Store from* J. W. Smith*One Thousand* _____ *Bushels**of* No. 2 Spring Wheat *subject only**to the order hereon of* L. Y. Browning*and the surrender of this receipt and payment of
charges.**It is hereby agreed by the holders of this receipt that the grain herein
mentioned may be stored with other grain of the same grade by inspection.
Loss by fire or heating at owner's risk. This grain is subject to our adver-
tised rates of storage.*

Not good Unless Countersigned and Registered.

W. H. WHITNEY, Lessee.

1000 Bush. 60000 Lbs.L. B. Brown R. J. Kelley

206. Warehouse Receipts. So far as these instruments are concerned, their use is confined to places for storage of property for sale, notably produce and grain. When, for example, grain is delivered, a receipt is given. It is both a receipt and a contract, a receipt in that it recites the receipt of the property by the ware-

64x13 9 21 1022 W. D. 2634

UNIFORM ORDER BILL OF LADING
(PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION)

Shipper's No. 9478

ORIGINAL

Agent's No. 1722

Agent's No. 1722

RECEIVED. subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

New York Dec 20, 1922

John Lawrence
The property described below, in apparent good order, except as noted (notices and conditions of contents of packages unknown), marked, consigned, and destined as indicated below, which said Company (the word company being understood throughout this contract as meaning any person or corporation) hereby agrees to carry to its usual place of delivery at said destination, if on its own water-line, or to its own water-line, otherwise to deliver to another carrier, subject to the usual conditions of through bills of lading, and to the payment of its share of said property over all or any portion of said route to destination, and as to each part at any time, interested in all or any said property, and to be performed hereunder, subject to the usual conditions not prohibited by law, whether printed or written, hereinafter contained in this contract, and to the terms, which are hereby agreed to by himself and his assigns, of the bill of lading hereunto attached.

The surrender of this Original **ORDER BILL** of Lading property indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

(Mail or street address of consignor. For purposes of notification only.)

ORDER OF *John V. Providence* (129 Pleasant Avenue)

Consigned to ORDER OF JOHN W. ...
 Destination Philadelphia State of Pa County of

Notify George Barker

At Philadelphia State of Pa County of _____

Route P.R.R. P.R.R. 24 237

Delivering Carrier:

Car Initial *SKK* Car No. *84237*

No.	DESCRIPTION OF ARTICLES, SPECIAL MARKS.	*WEIGHT	CLASS	CHECK	If this shipment is to be deliv-
-----	---	---------	-------	-------	----------------------------------

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	(Subject to Correction)	OR RATE	COLUMN	ated to the consignee without recourse on the consignor, the
-----------------	---	----------------------------	---------	--------	---

4	Cash	GB	2700	1		consignor shall sign the following
---	------	----	------	---	--	------------------------------------

-4-	Cable	No. 10	No. 10	No. 10	No. 10	No. 10	No. 10
	</						

[illegible]

1. Name of person	2. Address	3. City	4. State	5. Zip	6. Conditions
-------------------	------------	---------	----------	--------	---------------

(Signature of consignee.)

If changes are to be made

					If charges are to be prepaid, write or stamp here, "To be prepaid."
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Per _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shippers' weight."

NOTE.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the contents.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

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Feb 21 1892

John H. Lawrence Editor March Agent

1890

Permanent add-office address of shipper... 285 Fifth Ave.

1. *How Used.* The warehouse receipt is a commercial instrument of great importance. In the grain business millions of bushels are stored each year, for which warehouse receipts are issued and a regular storage fee charged. The grain is bought, sold and delivered by means of transferring this receipt, which

represents the title. The transfer of the receipt with the proper intent effectively conveys the title to the purchaser, but the liability of an indorser does not follow. The instrument, then, lacks this element of negotiability. It is frequently used as collateral security.

207. Bills of Lading. A bill of lading is an instrument issued by a common carrier upon the receipt of goods for transportation. The instrument is both an acknowledgment of the receipt of goods for transportation and a contract. As a receipt it is subject to parol explanation, while as a contract it is not. Bills of lading are in two forms: negotiable and non-negotiable. Both may be transferred, one by negotiation and the other by assignment.

1. *How Used.* The bill of lading is used to facilitate and secure the transfer of credit. The grain-buying business in the Western States furnishes a good illustration of this use. Warehouse receipts are used, as collateral in much the same way. In indorsing a bill of lading, the usual methods of indorsement may be used. Conditional indorsements are frequently used. Another method is to indorse, directing the railroad company to deliver the shipment to the consignee upon the receipt of all charges. The use of these receipts may be further illustrated as follows: A grain buyer who has a cash capital of five thousand dollars arranges with a commission house to sell all the wheat he ships, and with a banker who agrees to cash drafts that are accompanied by bills of lading as security. The buyer goes into the wheat country with his five thousand dollars and invests it in wheat, which is subsequently delivered to the railroad for transportation. He receives a bill of lading for the wheat. He draws on his banker for the proportionate amount of the cost of the wheat previously agreed upon, attaches the bill of lading properly indorsed, and cashes the draft. The banker has the title to the wheat evidenced by the bill of lading as security. When the commission merchant effects a sale he deducts his various charges and also pays the draft held by the banker. The remainder goes to the grain buyer, who in the meantime has invested the proceeds of the discounted draft and perhaps repeated the process several times.

While the grain buyer's capital is but five thousand dollars, his working capital for the season may exceed a hundred thousand dollars. He is thus, through the agency of the bill of lading and the draft, enabled greatly to increase his profits in a perfectly legitimate way.

208. Negotiability. These instruments do not possess all the elements of negotiable paper. For example, the guarantee of the indorser does not follow. A perfect title, however, is given, which is no greater than that possessed by the indorser. The guarantees of the common law exist in favor of the holder. The conditional guarantee of the law merchant is lacking.

209. QUESTIONS ON TEXT

Name some of the instruments that have not been given full negotiability.

What is a letter of credit? Explain its use. What is a traveler's check?

What is a bond? Who issues bonds? Do they bear interest, and how is the interest generally evidenced?

What is a warehouse receipt? Explain its use. What is the measure of the banker's safety who loans on a warehouse receipt?

What is a bill of lading? How is it used to raise money? Discuss the negotiability of these instruments.

CHAPTER XXXIV

DEFENSES

210. INTRODUCTION

1. The Distinction
2. Delivery
3. Incapacity
4. Void by Statute
5. Alteration
6. Lunacy
7. Fraud
8. Duress
9. Failure of Consideration
10. Payment

211. QUESTIONS ON TEXT

210. Introduction. The defenses offered as an objection to the payment of negotiable paper may be against the instrument or they may be of a personal character. To discuss fully the question it will be well to classify parties as mediate and immediate, and defenses as real and personal. Mediate parties are those who are separated by another party or parties, and immediate are those standing next to each other in their order of liability. A real defense is a defense or objection to the instrument itself, while a personal defense is one arising out of the transaction, and relates rather to the acts that caused the instrument to be issued than to the instrument itself. The following are real defenses: No delivery, incapacity, void by statute, alteration, forgery, and, perhaps, lunacy. The following are personal defenses: Fraud, duress, failure of consideration, and payment.

1. *The Distinction.* Personal defenses are good and available between immediate parties or a line of parties with notice. They cease to be valid as soon as a *bona fide* party intervenes. Real defenses are good against all subsequent parties, whether mediate

or immediate. Personal defenses are against the creative act, while real defenses are against the instrument; the former acknowledge the instrument but deny its standing; the latter deny the very existence of the contract.

2. *Delivery*. This is one of the essential elements of all negotiable papers, and to prove that an instrument never was issued with the authority or consent of the maker is to defeat the legal effect of the instrument. Paper stolen and put into circulation by the thief does not in any way obligate the maker. No subsequent holder has a valid claim against the maker. This rule does not hold good in the case of money.

3. *Incapacity*. This defense, when urged against the enforcement of a negotiable instrument, needs no discussion. Parties lacking capacity are not bound by their contracts. The minor is an example of this class.

4. *Void by Statute*. If the statutes of a State declare an instrument invalid, it cannot be enforced even by a *bona fide* purchaser. While usury is illegal according to statute, it is not necessarily a defense against a purchaser in good faith. Notes given in consideration of wagers or gambling are frequently made void by statute.

5. *Alteration*. If a material alteration is made in an instrument the maker is released. The instrument is not the one signed and delivered. Forgery is a real defense, for it lacks intent and consent on the part of the one whose name is forged. The following are considered material changes; as, the date; adding a rate or changing the rate of interest; the principal; the time; the place of payment; the kind of money as to gold; or the relationship of the parties; as changing parties' liability from joint maker to that of surety.

6. *Lunacy*. This is not necessarily a real defense. But if the maker is an adjudged lunatic, his negotiable instruments are void in the hands of all subsequent parties so far as he is concerned.

7. *Fraud*. If the transaction out of which issues a negotiable instrument is tainted with fraud, it is a personal defense and good only between immediate parties or those having knowledge of it; but if fraud is practiced in the making of an instrument, it is a real defense.

8. *Duress*. When a contract is procured by resorting to force, the delivery lacks both intent and consent. It is therefore voidable but not void. Properly, prompt effort should be made by the maker so that he may not be chargeable with negligence. Duress as a defense is always available against immediate parties, and, at times, will constitute a real defense. (See Case No. 17.)

9. *Failure of Consideration*. Consideration as a defense is always presumed between immediate parties, but this presumption may be overcome. As in ordinary contracts, inadequacy is no defense.

10. *Payment*. This is an extinguishment of the contract and may always be offered as between immediate parties. If a transfer is made after maturity by the payee, the defense of payment is good against the subsequent party, because his transferrer has no property in a contract which has already been extinguished. If, however, the payment is made before the maturity of the paper and it is transferred before maturity to an innocent purchaser, the defense of payment will not be effective.

211. QUESTIONS ON TEXT

Explain the following: defenses, mediate and immediate parties; real and personal defenses.

What is the distinction between a personal and a real defense?

What constitutes a good delivery? What kind of a defense is incapacity? Give an example. Explain the defense "void by statute."

What effect on the standing of an instrument has an alteration? Is lunacy a personal or a real defense? How does fraud affect a contract? What is duress and when a defense?

To what extent is failure of consideration a good defense? When is payment a good defense and when not?

CHAPTER XXXV

GUARANTY AND SURETY

212. INTRODUCTION

1. Parties
2. Consideration
3. Kinds of Guaranty
4. Payment of Note
5. Negotiability

213. HOW EXTINGUISHED

1. Notice
2. Acts of Debtor and Creditor
3. Payment
4. Release

214. RIGHTS OF SURETY OR GUARANTOR

1. Contribution
2. Subrogation

215. NOTICE

216. QUESTIONS ON TEXT

212. Introduction. These terms are frequently used synonymously. That there are certain points in common cannot be denied, but it is also undeniable that this looseness of definition leads to misunderstanding. Both guaranty and surety are undertakings to answer "for the debt or default of another," and therefore the agreements must be in writing according to the Statute of Frauds. The agreements differ materially in the following: A *guaranty* is a separate and distinct contract parallel to another, known as a principal contract, while a *surety* is an undertaking to make good the principal contract of which it is a part. (See Case No. 48.)

1. *Parties.* In either case three parties are contemplated, the debtor, the creditor, and the one assuring the debtor's liability,

called the surety or guarantor. The debtor is the one primarily obliged to pay some debt or obligation, or who has some duty to perform. The creditor is the one to whom the debt or obligation is to be paid, or the one to whom the performance of the duty is due. The third party is secondarily liable, and undertakes to perform in case the principal debtor fails in his obligation. He receives no benefit from the transaction. The consent of the creditor must be had as well in forming the secondary, as in the principal, obligation.

2. *Consideration.* The consideration exists between the debtor and the creditor as in an ordinary contract. It may be a benefit to the promisor, or a detriment to the promisee, or it may be mutual. The consideration should be expressed in writing, al-

SPECIAL GUARANTY

Indianapolis, Ind., June 2, 1925.

Carson, Scott & Co.,

Chicago, Ill.

Gentlemen: If you will kindly allow Mr. A. A. Brewer credit for sixty days on a bill of goods not to exceed five hundred dollars, I hereby agree to guarantee the prompt payment of the bill.

Very respectfully,

R. W. Miller

though it is generally sufficient to use the words "value received." If the secondary contract is entered into at the same time as the original one, the same consideration is sufficient for both contracts. If, however, the second contract is entered into subsequently to the making of the original contract, then there must be another consideration to bind the new agreement. The new consideration may be a sum paid to the one conditionally liable, or it may be accomplished by changing the time of payment in the original agreement. (See Case No. 49.)

3. *Kinds of Guaranty.* Guaranties are *special* when directed to a particular person, and *general* when addressed to the public. The amount for which the guaranty is given may be limited or it may be unlimited. As to whether a guaranty is to be acted upon at once or is to continue for a reasonable time, depends upon the construction given to the language used. Unless it appears to be the intention of the party giving the guaranty that it shall be continuous, it will be held to be for the present time.

4. *Payment of Note.* If the guarantor of a note writes "I hereby guarantee the payment of the within note," it is generally understood to be an absolute undertaking to pay. If payment at maturity is defaulted, the guarantor is liable without notice and the holder may demand payment at once. If the guaranty reads "I hereby guarantee the collection of the within note," the holder must exhaust all other resources before he can hold the guarantor liable. He must reduce his claim to judgment if the guarantor insists.

5. *Negotiability.* There is no uniformity on this question. However, if the writing in the form of a signature appears on the face of a note with that of the maker, it is called a suretyship and the collateral contract is negotiable. If the agreement is written on the back of the instrument, the liability is that of an indorser and it is negotiable.

213. How Extinguished. 1. *Notice.* If a continuing guaranty is given and has not been fully taken up, the guarantor may annul the balance by notice, but this notice will not affect the part already acted upon. The guaranty will extinguish itself by lapse of time.

2. *Acts of Debtor and Creditor.* Any special agreement entered into between the debtor and the creditor, wherein a specific change is made in the nature of the original contract, releases the guarantor or surety. A definite extension of time for a new consideration would be sufficient. An extension of time that is in the nature of a forbearance is not sufficient to release the one conditionally liable. A diversion to another object of the fund for which one becomes responsible will annul the special agreement of guaranty or suretyship. If the debtor and creditor make

any material alteration in the contract, it will release the guarantor. It would be substituting a new for an old contract which was not assented to by the guarantor. (See Case No. 50.)

3. *Payment.* The contract of guaranty is extinguished when full payment is made by the debtor; the reason for the conditional agreement ceases. A part payment releases the guarantor from a like amount. The guarantor has no right to insist that a payment made by the debtor shall be applied on the debt he guarantees in case there are other debts between the debtor and creditor. The debtor and creditor are sole judges as to the application in such a case. A compromise in regard to the principal debt by the debtor and creditor releases the conditional liability of the guarantor at least to the extent of the compromise.

4. *Release.* If a release based on a sufficient consideration, or one under seal, is given to the debtor by the creditor, the guarantor will be released. So, also, if the creditor accepts a higher security for his claim, the merging of the lower into the higher security will work an extinguishment of the guaranty.

214. Rights of Surety or Guarantor. Neither guarantor nor surety have any rights against either party before the maturity of the original claim. At maturity the one conditionally held may pay the principal obligation and then enforce the claim against the debtor. He may collect all charges and items of cost in addition to the original claim, as a note for \$500, interest \$25 and protest fees \$5.25. The chief rights are the following:

1. *Contribution.* Where several parties are conditionally liable on one debt and it is paid by one of them, he has a right to collect a pro rata share from each of the rest. This right exists only in regard to the amount of the original claim. It does not relate to additional charges, such as cost of trial. However, if a co-surety is sued on a claim, he generally asks that all of the sureties be made defendants, and then his rights to contribution will be fixed in regard to additional charges. As when B, C and D are jointly and severally liable on a note of which A is maker, and on failure to pay at maturity B takes up the note. He has a right to collect one-third of the claim from each of C and D. In case D is a bankrupt then B may collect one-half from C. The

principal debt against A is not discharged nor is the contributing claim against D, as in the latter case.

2. *Subrogation*. When a principal debt has been paid by one conditionally liable, he has a right to demand from the creditor all securities and evidences of indebtedness that may have been delivered to the creditor by the debtor. As when E, who is conditionally liable on a note with A wherein the latter has deposited with the payee of the note certain bonds as security, then on payment of the note by E, he may demand not only the note but the bonds and he now becomes the principal debtor.

215. Notice. The question of notice is not entirely settled. It is generally held that the surety is not entitled to notice and that he becomes absolutely liable when the debt is not paid at maturity. A guarantor is generally held to be entitled to notice within a reasonable time after default of payment. If he is not notified, he is held released to the extent of the detriment caused by not having notice. The safe way is to give notice in each case promptly, as in the case of an indorser.

216. QUESTIONS ON TEXT

Compare guaranty and surety. How many parties in each case? Name them. What has a consideration to do with such agreements? If the principal contract is made at one time and the guaranty at another what must be done to make the latter binding?

Explain the following: Special and general, limited and unlimited guaranty.

What distinction is made between a guaranty of payment and one of collection? When are such agreements negotiable and when not negotiable? How may a guaranty be terminated?

What effect have special agreements between debtor and creditor? Give examples. When is the guarantor or surety released, and when partially released? What effect has a release secured by the debtor from the creditor?

Explain the rights of surety or guarantor, their rights of contribution and subrogation. To what extent is notice binding?

CHAPTER XXXVI

APPLICATION OF COURT DECISIONS TO FACTS

1. Facts: X came to the house of Y. He received permission to stay overnight. X said he was the agent of the A. B. C. Medicine Company. Y was a man more than seventy years of age. He had been an invalid thirty years. He read with difficulty and only with the aid of strong glasses. X gave Y some medicine. Y took it during the evening. The medicine benumbed Y's faculties. The next morning X gave Y some more medicine which Y took. This last dose of medicine impaired Y's mental faculties. Y was then asked to become the agent of the A. B. C. Medicine Company. Y consented to become the company's agent, and was asked to sign a paper which was represented to be a contract and which he (Y) believed was a contract, appointing him the agent of said company. The paper, however, which Y was induced to sign was a promissory note payable to the order of X. X negotiated the note to Z. Z, the holder of the note, brings an action against Y, the maker. Z proves Y's signature, introduces the note in evidence, and rests his case.

Ruling Cases: *Mitchell v. Tomlinson*, 91 Ind. 167; *Clark v. Pease*, 41 N. H. 414. •

- (a) Is there a prima facie presumption that X gave Y sufficient consideration for the note?
- (b) Is there prima facie presumption that Z is a holder in due course for value and without notice of defense?
- (c) What is the effect, if any, if Y proves that the note was obtained by X by fraud?
- (d) Assuming that Y proves that X obtained the note fraudulently, what proof should X next introduce in order to try to "make out" his case?
- (e) Is fraud a personal defense or an absolute defense?
- (f) Can Z recover the amount of the note from Y?

2. Essential Conditions of a Negotiable Instrument. Facts: Below is a common form of promissory note:

\$100.00	Boston, Mass., April 8, 1925.
One year after date, at the Lee State Bank, I promise to pay R, or order, One Hundred Dollars, with interest at 6 per cent per annum. Value received.	
(D.) J. W. MILLER.	

Ruling Cases: *Currier v. Lockwood*, 40 Conn. 349; *Moses v. Lawrence et al.*, 149 U. S. 298; *Wilson et al. v. Third, etc.*, 103 U. S. 790; *Brown v. Band D. Bank*, 6 Hill (N. Y.) 443; *Taylor v. Dobbins*, 1 Strange 309; *Dodge v. Emerson*, 34 Md. 96; *Fralick v. Norton*, 2 Mich. 130; *Musselman v. Oakes*, 10 Ill. 81; *Noxon v. Smith*, 127 Mass. 485; *Richardson v. Carpenter*, 46 N. Y. 660; *Kelley v. Hemingway*, 13 Ill. 604.

- (a) In the above note, if, instead of "I promise to pay," etc., it had contained the words, "Due R, One Hundred Dollars, value received," would it be a promissory note?
- (b) Are the words "Value received," necessary to the negotiability of the note?
- (c) Are the words "or order," necessary to the negotiability of an instrument? If not, what purpose, if any, do they serve?
- (d) Is it necessary that the signature be made by writing the name of the signer?
- (e) Is it necessary that the signature of the signer be made at the close of the instrument?
- (f) Would the above note be negotiable if the maker, D, promised to pay One Hundred Dollars in Canadian money?
- (g) Would the above note be negotiable if the promise were to pay \$100.00, but only \$50.00 if paid by February 8, 1926?
- (h) Would the above note be negotiable if it were payable to R or W?
- (i) Would the above note be negotiable if it were payable to the Trustees of the Kent College of Law or their Collector?
- (j) Would the above note be negotiable if the One Hundred Dollars were to be paid out of the proceeds of the sale of D's cattle?
- (k) Would the above note be negotiable if it were payable to R, when he is thirty-five years old, or when he marries, instead of one year after date?
- (l) Would the above note be negotiable if the payment of the One Hundred Dollars were to be charged to a certain account?

3. Facts. Purchaser for Value Without Notice.

\$100.00

Tacoma, Washington, May 8, 1925.

One year after date, I promise to pay to A or bearer One Hundred Dollars, at the Lee State Bank, with interest at 6 per cent per annum. Value received.

(B.) A. M. BROMWELL.

Principal.

Ruling Cases: Truesdell v. Thompson, 72 Met. (Mass.) 565; Miller v. Race 1 Burr. 452; Lowe v. Waller, 2 Doug. 736; Kendall v. Robertson, 12 Cush. 156; Miller v. Finley, 26 Mich. 249; Humphrey v. Clark, 27 Conn. 381; Oates v. Nat. Bank, 100 U. S. 239; Blanchard v. Stevens, 3 Cush. 162; Seybel v. Bank, 54 N. Y. 288; Jones v. Gordon, 2 App. Cas. 616.

- (a) If the above note is stolen from the owner by C, who transfers it for value and before maturity to D and D has no notice of the theft, is B liable to D?
- (b) If under the supposition in (a) the note was transferred to D after maturity, would B be liable to D?
- (c) If C had stolen a diamond ring from the owner, instead of the note in question, and sold it to D for value and without notice of the theft, would D get a good title or could the owner reclaim it?
- (d) If B had made out the above note to A in payment of a gambling debt in a State where contracts based on such consideration are absolutely void, and A sells the note before maturity to C, who pays a valuable consideration for it and has no knowledge of the transaction between B and A, is B liable to C in a suit on this note?
- (e) Assume that B is induced by A's fraud to execute the above note to him (A), would this be a good defense for B to set up in a suit on the note by A against B?
- (f) Assume that B is induced by A's fraud to execute the above note to him (A), which is afterwards sold by A to C before maturity for a valuable consideration and without notice, is B liable to C in a suit on the note?
- (g) What is the meaning of the word "value" in the phrase "for value," as used in bills and notes?
- (h) What is the meaning of the word "notice" in the phrase "without notice," as used in bills and notes?

4. Transfer of Commercial Paper After Maturity. Facts:

\$100.00

Charleston, S. C., August 1, 1925.

One year after date I promise to pay to the order of B, One Hundred Dollars with interest at six per cent per annum.

Value received.

A.—

Ruling Cases: *Bissel v. Gowdy*, 3 Conn. 47; *Robertson v. Lane*, 64 Me. 108; *Burroughs v. Moss*, 10 B. & C., 558; *Robinson v. Lyman*, 10 Conn. 30.

- (a) If A makes the above note to B for a fraudulent consideration and B transfers it after maturity, for value, to C, an innocent purchaser having no knowledge of the consideration for which it was made, in a suit on it can C recover against A?
- (b) If C had purchased the note before maturity and had transferred it to D, for value and without notice of the fraud, after maturity, can D in a suit on the note recover against A?
- (c) Under the supposition in (b), assume however that D had knowledge of the fraud between the original parties (A and B), but that C had no such knowledge, can D recover against A?
- (d) If the note above is made on a good consideration by A to the order of B, but that there is a collateral obligation which A holds against B, which is available by A as a set-off against B in a suit on the note, and that B transfers the note to X after maturity, can A then successfully avail himself of this set-off between the original parties against X, the transferee?

5. Discharge of Primary Debtor. Facts: A, for a lawful consideration, makes his note to the order of B, payable in six months. Before maturity, B transfers it to C, who pays value for it.

Ruling Cases: *Blade v. Noland*, 12 Wend. 173; *Bragg v. Danillson*, 141 Mass. 195; *Harrison v. Edwards*, 12 Vt. 648; *Brennan v. Bank*, 62 Mich. 334; *Doubleday v. Kress*, 50 N. Y. 410; *Citizens, etc. Bank, v. Richmond*, 121 Mass. 110; *McGrath v. Clark*, 56 N. Y. 34.

- (a) If the note is paid by A in due course and surrendered to him, is he discharged from liability on it?
- (b) If C, the holder, voluntarily destroys the note, is A discharged from liability on it?
- (c) If C renounces his rights to the note, is A discharged from liability on it?

- (d) If, before maturity, A, the maker of the above mentioned note, paid it to C, the holder, but did not take up the note and C thereupon sold it to D, a bona fide purchaser, can D recover from A in suit on the note?
- (e) If the note in question is indorsed in blank by B in transferring it to C, a bona fide purchaser, and that it is stolen from C by D; and that when the note is due, D presents it to A, who pays it? Must A pay it again to C?
- (f) If, under the supposition in (e) B had indorsed the note in full in transferring it to C, and A had paid it to D, the thief, upon presentment at maturity, must A pay it again to C?
- (g) In the note that A makes to B or order, the amount is so cleverly raised by B that it is not detected; and after altering it, but before maturity, he transfers it to C for value, without notice of the change. In a suit on the note by C, can A successfully refuse to pay it on account of the alteration?
- (h) Under the supposition in (g) assume that the amount had not been raised, but that the date had been changed, or that the words "with interest" had been added, can A in a suit on the note successfully set up such alterations?

6. Facts: A, forging B's name, draws a check upon the C bank and sells it to D who has no knowledge of the forgery. The C bank pays D and afterwards discovers the forgery.

Ruling Cases: *Price v. Neal*, 3 Burr. 1354; *Bank v. Bank*, 10 Vt. 141; *Reddington v. Woods*, 45 Cal. 406; *Birmingham National Bank v. Bradley*, 103 Ala. 109; *Marine Nat. Bank v. City Nat. Bank*, 59 N. Y. 67; *Parker v. Roser*, 67 Ind. 500; *La. Nat. Bank v. Citizens Nat. Bank*, 28 La. Ann. 189.

- (a) Does B or the C bank lose? Why?
- (b) Can the loser recover from D? Why?
- (c) If D had knowledge of the forgery, who loses?
- (d) In the above problem, if A, instead of forging B's name, had raised the amount of the check and sold it to D, who would lose?
- (e) If, in the above problem, instead of forging B's name, the amount of the check had been raised and the C bank had certified the raised check, and afterwards had paid an innocent holder who had taken it on the strength of the certification, can the C bank recover from the innocent holder?

7. Guaranty. Facts: A owes B a debt which C guarantees to B. Afterwards B gives A, without C's consent, an extension of

time that is valid and enforceable. When the time expires A does not pay B.

Ruling statute and cases: Statute of Frauds; Lowman v. Yates, 37 N. Y. 601; and Tobey v. Ellis, 114 Mass. 120.

- (a) In what form must C's guaranty be made in order to be binding?
- (b) In what form should the extension that B gives A be made in order that it be valid and enforceable?
- (c) Is C liable for the payment of the debt after B's giving A an extension of time? Why?
- (d) If B in giving the extension of time to A reserves the right to sue C, would C then be discharged from liability?
- (e) If B gives A a release in full, but reserves all rights in regard to the debt against C, can B maintain a successful suit against C on the guaranty?
- (f) Under the supposition in (c) can C still sue A?

CHAPTER XXXVII

MISCELLANEOUS TOPICS

217. HYPOTHETICAL PROBLEMS

218. CONSTRUCTION WORK

219. MOOT COURT CASE

220. SEARCH QUESTIONS (STATE LAWS)

217. HYPOTHETICAL PROBLEMS

1. A agrees to sell B 500 bushels of wheat at \$1.00 per bushel. B gives in payment his non-negotiable note. The note is delivered and also 250 bushels of wheat, but there is failure to deliver the balance of the wheat. At maturity A demands payment of the note. Discuss rights of parties.

2. Same conditions as in 1, but the note is negotiable. Discuss rights of parties.

3. Compare negotiable and non-negotiable notes when but original parties are interested.

4. Write the note called for in No. 1. Name several ways in which the note may be made non-negotiable.

5. Same conditions as in 1, but the note is transferred to C without notice before maturity. C demands payment at maturity. Discuss rights of parties.

6. Same conditions as in 1, but the note is negotiable and is transferred to C as in 5. C demands payment at maturity. Discuss rights of parties.

7. Compare negotiable and non-negotiable notes when subsequent parties, as in 5 and 6, are interested.

8. Same conditions as in 1, but the note is negotiable and is transferred to C with notice. C demands payment at maturity. Discuss rights of parties.

9. Compare the rights of parties in the transfer of non-negotiable and negotiable notes, as in 5 and 8.

10. Same conditions as in 1, but the failure of consideration occurs after the transfer to C has been effected. C demands payment at maturity. Discuss rights of parties.

11. Same conditions as in 1, but the note is negotiable and is transferred to C without notice, then transferred to D who has notice. Discuss the rights of parties.

12. A is maker, B is payee of a note. It is transferred to C who indorses "without recourse" to D. At maturity D demands payment from A who sets up infancy. Discuss rights of parties.

13. A is maker, B is payee of a note. C, D, and E are holders through indorsements in regular order. The note is a foreign instrument and is dishonored by A at maturity. Discuss steps to be taken by last holder to fix liability of parties. Make out a set of papers such as are necessary in this case.

14. A is maker, B is payee of a note, C first holder. A pays part of note and receives a receipt for the payment, no indorsement is put on the note; after this D and E are holders in order through indorsements. At maturity E demands payment in full to which A objects, presenting his receipt. Discuss rights of parties.

15. A is drawer, B is drawee, C is payee, and D is indorsee of a draft. Discuss rights of parties.

16. Conditions as in 15. B accepts draft. Discuss rights of parties.

17. Conditions as in 15. B accepts draft, making it payable in a different city. Discuss the rights of parties.

18. Conditions as in 15. B accepts draft, making it payable out of the proceeds of a certain shipment. Discuss rights of parties.

19. Conditions as in 15, but it is a check. Discuss rights of parties.

20. Conditions as in 19, but A has the check certified before delivery. Discuss rights of parties.

21. Conditions as in 19, but D has check certified. Discuss rights of parties.

22. Compare 20 and 21 as to results.

23. The Central Cal. Co. is a corporation. A. A. Brown is President and W. F. Barnes is Secretary. The blank forms used for notes have the name of the corporation across the end. Each official adds the name of his office after his name. Write such a note.

24. Same as in 23. Many such notes have been issued and paid by the corporation. The corporation fails with something like one hundred thousand dollars of such notes outstanding. Suit is brought against Brown and Barnes individually with a view of compelling them to pay from their private property. Discuss rights of parties.

25. The following is issued "I, W. F. Barnes, hereby promise to pay O. E. Grant or order five hundred dollars." Is this a negotiable instrument?

26. Discuss the following: "Baltimore, Md. Mr. James Smith, Washington, D. C. My Dear Mr. Smith: Please pay Mr. R. W. White or order one hundred dollars for me, and greatly oblige, Yours truly, W. P. Brown."

27. Discuss rights and liabilities of parties in following: "Chicago, Ill., Jan. 1, 1925, Mr. W. B. Stephens, Burlington, Iowa. Dear Sir: Please pay Mr. James Smith or order five hundred dollars when the foundation to house at 125 State St., Burlington, is complete according to specifications, also pay him one thousand dollars when the walls are complete and same are approved by the architect. Very respectfully, A. A. Brown."

28. "I. O. U. \$100.00, signed A. E. Brown." Is this a negotiable instrument? If not, what is its standing?

29. "I promise to pay A or order \$100 in potatoes." Is this negotiable or non-negotiable? Why?

30. "Pay B or order \$500.00 or less as then may be due." Is this negotiable? Discuss its standing.

31. "I promise to pay C or order \$750 when he is of age." Discuss its standing.

32. "\$100.00.

Buffalo, N. Y., Jan. 1, 1925.

One month after date I promise to pay to the order of myself One Hundred Dollars.

(Signed) D. N. Williams."

This paper is indorsed by Williams, and at maturity is held and presented for payment by D. B. Bowman. Discuss liability.

33. One instrument reads "Pay B or bearer" and another one reads "Pay to bearer B." Is there any difference and if so what is it?

34. A forges B's name as drawer of a draft, naming himself as payee and C as drawee. C accepts this draft, and A indorses and transfers the draft to D for value, etc. D demands payment at maturity. C now knows of the forgery. Discuss rights of parties.

35. Conditions as in 34, but A raises a draft drawn by B from \$100.00 to \$1,000.00. Discuss rights of parties.

36. A signs and delivers a blank note to B, with instructions to buy a certain horse, directing him to fill in the amount. B instead fills in the amount for \$500.00, naming himself as payee, and negotiates the note to C, who demands payment at maturity. Discuss rights of parties.

37. Two notes in part read as follows: One, payable in five years with interest at 6 per cent per annum; the other, payable in five years with interest at 6 per cent payable yearly. Discuss.

38. A owes B an amount \$150, later he gives B his note for the amount payable in six months. Of what is this transaction an illustration? Continue the illustration to a still higher security.

39. C owes D \$500, on open account contracted on June 2, 1903, due in seven months without interest; on September 1, 1905, C pays the interest due on the account; on July 15, 1906, he pays \$100 on account; on December 15, 1906, he leaves the State and returns on March 1, 1907. What is the last day upon which suit can be brought by D against C in your State and for what amount?

40. E owes F \$175 due now, and F owes E \$150 due today. F brings suit against E for the amount due him. Discuss rights of party.

41. Mr. A owes Mr. B \$1500.00 in the form of a negotiable promissory note. The note is due in one year; viz., July 1, 1925. On November 1, 1924, Mr. A paid to Mr. B \$500.00, and on April 1, 1925, he paid him \$600.00. In each case he took Mr. B's receipt for the amount of the payment, and in each receipt

he included a copy of the note on which the payment was to apply. On about ten days before the maturity of the note, Mr. A received a notice in the usual form that a bank in his town holds his note for \$1500.00 due and payable on July 1, 1925, and would he kindly give the payment his attention. Discuss rights of parties.

218. CONSTRUCTION WORK

In drawing the following described instruments use slips of paper $3\frac{1}{2}$ inches by 8 inches, or write three on a sheet of paper commercial size, or four on a page of foolscap. Separate with a ruled line. The student will write the word "Specimen" (in red ink, if convenient) across the face of each paper he writes. Except where otherwise directed, use the following data: date, the present; time, thirty days; amount, \$100; payee, A. A. Brewer; maker or drawer, student; drawee, L. J. Madison. The teacher will supply additional data.

1. Draw a promissory note containing only the essentials.
2. Draw a note bearing interest.
3. Draw a promissory note bearing interest payable at a particular place.
4. Draw a joint note, making it payable any time within one year.
5. Draw a joint and several note.
6. Draw a note payable to two payees, not partners.
7. Draw a note showing the maturity as a part of the body of the instrument.
8. Draw a judgment note, short form.
9. Draw a collateral note using notes number 3 and 4 as collateral, Jas. G. Holland as maker.
10. Indorse No. 1 in full to A. N. Palmer.
11. Indorse No. 2 with restrictive indorsement to W. F. Slocum.
12. Indorse No. 5 with the following indorsements: In full to A; full waiver to B; full qualified to C; full conditional to D; restrictive to E.
13. Draw a sight draft.
14. Draw a draft at so many days sight.
15. Write acceptance to No. 14.
16. Draw a time draft at so many days after date.
17. Write acceptance to No. 16. Write a trade acceptance.
18. Draw a ten days' draft and place five indorsements on it as follows: 1st in full, 2d full qualified, 3d full waiver, 4th in full, 5th blank. The holder presents the draft for acceptance and it is dishonored. Make out the protest papers and a notice for each party conditionally liable. The day following two parties offer to accept the draft, one for the honor of the drawer and one for the honor of the first indorser. Write the acceptances.

On the due date the draft is presented for payment and is again dishonored. Make out protest and send proper notices.

19. Draw a check. Have it certified. (Use rubber stamp if one is available.)
20. Draw a set of three bills of exchange on London. Have one of them accepted.
21. Draw a cashier's check.

22. Draw a traveler's check for \$100, showing its value in London (pounds); Paris (francs); Berlin (marks).
23. Draw a bank draft and indorse it in full to R. E. Grant & Co.
24. Draw a note, making it payable in merchandise from your store. Is it negotiable?
25. Draw an I. O. U.
26. Draw a sight draft, directing that it be charged to the proceeds of a certain shipment of potatoes.
27. Draw a note for \$1000, making it payable in ten equal monthly payments.
28. Draw a receipt reciting payment in full of a claim not yet due.
29. Draw a note signing as agent, but so worded as to assume no personal liability.
30. Draw a note to be signed by three trustees of a church. They are to assume no personal liability.
31. Draw a draft and attach to it a properly indorsed bill of lading.
32. Draw a note with the following indorsements: A, B, C, D and E. The paper being now in the hands of F who elects to erase C's indorsement. What effect will this have?
33. Draw a note and the following indorsements: A, B, C, D, E, and C, the C's being identical. F is the holder who has had the paper protested for non-payment. He collects from C. Discuss C's rights.
34. Draw a draft on two independent drawees at ten days' sight.
35. Show three transfers by indorsement on No. 34, and have the draft properly accepted.
36. Draw three notes, one payable on the death of a certain party; one payable on the arrival of a certain steamship at a certain port, and one payable on the 21st birthday of a certain third party. Discuss the standing of these three notes.
37. Draw a check payable to E. L. Coe, Treasurer Sloan Mfg. Co. Indorse it W. H. Jones, Treasurer, Sloan Mfg. Co. Is this paper regular?
38. Draw the following note, amount in figures \$325.60, amount in words Three Twenty-five and 60/100. Interpret the paper.
39. Draw a note signed by principal and surety and one independent indorser.
40. Draw a note. It is signed as follows: "Ed T. Taylor, agent of J. M. Smythe & Co." Discuss the liability of parties.
41. Draw a note payable to two independent payees and have it properly indorsed in full.
42. Draw a certificate of deposit, interest five per cent.
43. Draw a set of exchange and indorse them to two separate payees. Discuss relationship.
44. Draw a note for \$1000 interest at six per cent, indorse in full to A. Indorse payment of \$100; transfer by full qualified indorsement to B. Indorse payment of \$500; transfer by full indorsement to C.
45. Draw a note—address—date—time 30 days—amount \$250—payee your name—signed R. G. Bayard, Treas. Hide & Leather Co. It is held in *S v. H*, 59 Maine 172, and in *D v. E*, 141 Mass. 590, that the above is the personal obligation of Bayard, and that the use of Treas. Hide and Leather Co. is

but an added description of Bayard, as it were, to distinguish him from some other Bayard. A signature binding the Hide & Leather Company would be:

Hide & Leather Co.

By R. G. Bayard, Treas.

46. Draw a note—address, date, time 4 mos.; to order of the maker; amount \$1000; signed Brown Jones & Co.; indorsed by American Tobacco Co., by J. W. Mattes, Pres. The note is offered for and is discounted at bank by payee. It is held, in 116 N. Y. 281, that the indorsement is worthless as corporation officer cannot bind the corporation by an accommodation indorsement.

47. Write a guaranty limiting as to parties, amount, and time.

219. MOOT COURT CASE

1. *Action:* This is an action of debt.

Facts: A note for \$500.00 is signed by R. W. Maxwell as maker in favor of R. W. Scott & Co. as payee. Maxwell is a minor but claims he is of age. The consideration is not for necessities. R. W. Scott & Co. indorses in blank to W. H. Smith, he transfers without indorsement to E. K. Palmer, who in turn indorses in full to L. A. McMiller. Palmer knows that the maker is a minor and adds to the indorsement, "without recourse." McMiller indorses in full to E. R. Hart, who in turn indorses in full to E. K. Lowry, who in turn indorses to R. W. Scott, one of the original payees but on business not relating to R. W. Scott & Co., who in turn indorses to M. J. Gotthart, who indorses in full to Edgar Hart.

The note is dishonored on the ground that the maker was a minor.

The following facts are known to exist: that the only parties financially responsible are E. R. Hart, E. K. Lowry and E. K. Palmer as well as W. H. Smith whose name does not appear. It also develops that Edgar Hart, the holder, is E. R. Hart, the prior indorser. Full consideration was received in each transfer before maturity and in the course of business.

Issue: Can Hart maintain successful actions against Lowry, Palmer and Smith. It is suggested that three actions be tried.

220. SEARCH QUESTIONS (STATE LAWS)

Since the Negotiable Instrument Act has been passed in all of the States, the student is directed to a careful perusal of that act.



SALMON P. CHASE (1808-1873)

Educated at Dartmouth College, admitted to the bar in 1830, prominent in anti-slavery conventions, elected Governor of Ohio in 1855, appointed Secretary of the Treasury in 1861. Under his management the *National Banking Act* was passed which is still in force. In 1864 he was appointed Chief Justice of the Supreme Court. He presided at the trial of Andrew Johnson, President of the United States. His term as Chief Justice covers the Reconstruction period of American history. Many questions of great importance were settled during his time.

CHAPTER XXXVIII

SALES OF PERSONAL PROPERTY

221. INTRODUCTION

222.. ELEMENTS

1. Parties
2. The Contract
3. The Memorandum
4. Part Payment
5. Part Delivery
6. Price
7. Subject Matter

223. DELIVERY

224. CONTRACTS TO SELL

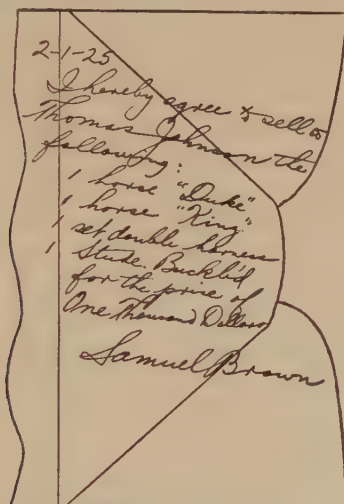
225. QUESTIONS ON TEXT

221. Introduction. The subject of Sales, which is a division of that of contracts, deals with the largest class of property transactions of modern commerce, including as it does, the contract of sale, and the agreement to sell. As to definition, a sale is generally considered as a transfer of title for a consideration. At common law the consideration was limited to money, but the Uniform Sales Act extends this limitation to cover any personal property.

222. Elements. 1. *Parties.* The parties must be legally capable of entering into the contract and the seller must be the owner of the property or his authorized agent to sell. The seller, as a rule, conveys to the purchaser no better title than that which he himself had, but in some instances, the purchaser may acquire a good title when the true owner is estopped from asserting his title by his own act, particularly where he has permitted the innocent purchaser to part with the consideration when a word on his part would have exposed the fraud.

2. *The Contract.* Reference should be made to the section of the Statute of Frauds relating to the sale of goods which is treated elsewhere in the text, as well as the Uniform Sales Act, if in force in the particular State. Three conditions are presented—(a) a compliance with the statute, (b) part payment of the purchase price, or (c) delivery of part of the goods, and these will be considered in turn.

A MEMORANDUM THAT SATISFIES THE LAW



The above is a sufficient memorandum to comply with the statutes. It is written with a pencil on the back of a part of an envelope. The formal bill of sale which may or may not follow the completion of the sale is found on the page following.

3. *The Memorandum.* Where the statute requires some note or memorandum "signed by the party to be charged," it need not be in contract form as it is not a contract, but is required as evidence of a contract. It should contain, however, the names of the parties, the subject matter of the sale, the terms, and any other qualifications to the contract that have been agreed upon.

4. *Part Payment.* The usual way of avoiding the necessity of reducing the agreement to writing is to make part payment of

BILL OF SALE

Know all Men by these Presents,

THAT _____ I, Samuel Brown _____ of the _____ City of
 Cedar Rapids _____ in the County of _____ Linn _____ and
 State of _____ Ohio _____ part^y of the first part, for and in considera-
 tion of the sum of _____ One thousand _____ Dollars, lawful money of
 the United States of America, to _____ me _____ in hand paid, at or before the en-
 sealing and delivery of these Presents, by _____ Thomas Johnson, party
 of the second part, the receipt whereof is hereby acknowledged, ha^{ve} granted,
 bargained, sold, and delivered, and, by these Presents, do^{es} grant, bargain,
 sell, and deliver, unto the said part^y of the second part, all the following
 GOODS, CHATTELS, and PROPERTY, to wit:

1 seven-year old gelding known as "Duke"

1 eight-year old gelding known as "King"

1 set double harnesses, silver plated

1 Studebaker buckboard

To Have and to Hold the said goods, chattels, and property unto the
 said part^y of the second part, _____ his _____ heirs, executors, administrators, and
 assigns, to and for _____ his _____ own proper use and behoof, forever.

And the said part^y of the first part do^{es} vouch _____ himself _____ to be the
 true and lawful owner of the said goods, chattels, and property, and have in
 him _____ full power, good right, and lawful authority, to dispose of the said goods,
 chattels, and property, in manner, as aforesaid: And _____ he _____ do^{es} for _____ his
 heirs, executors, and administrators, covenant and agree to and with the said
 part^y of the second part, to **Warrant and Defend** the said goods, chattels, and
 property to the said part^y of the second part, _____ his _____ executors, administra-
 tors, and assigns, against the lawful claims and demands of all and every person
 and persons whomsoever.

In Witness Whereof, we have hereunto set _____ our _____ hand^s _____ and seal^s _____
 the _____ first _____ day of _____ February _____ in the year one
 thousand nine hundred and _____ twenty-five _____

Sealed and Delivered in the Presence of

Samuel Brown [Seal]

[Seal]

the purchase price. While it need not be in money, this part payment must be something of value; a promise to pay is not sufficient. The statutes of some of the States require that the payment be made at the time of making the contract.

5. *Part Delivery.* A delivery of part of the goods sold is sufficient to satisfy the requirements of the statute, but the portion delivered must be honestly made with the intention of transferring the absolute title to the whole quantity. The amount delivered must also be such that the balance to be delivered must be less than the amount contracted for.

6. *Price.* Except where changed by statute, the price must be a money consideration. Adequacy of price, however, is not essential, and where no price is stipulated, the law presumes a reasonable price was intended, usually the market price.

7. *Subject Matter.* All forms of personal property except money may be bought and sold. The property, however, must be in existence; if it has ceased to exist, even if unknown to either or both of the parties, the sale fails. An agreement to sell goods not yet in existence, or to be manufactured, is not a sale but an agreement to sell and the distinction must be carefully noted. In the absence of statutory prohibitions, one may sell all that he lawfully possesses; he may also enter into an agreement to sell what he does not yet possess or what he may hereafter possess.

223. Delivery. While the completion of the agreement transfers title in the goods to the buyer, actual or constructive delivery of the goods to the buyer is necessary to complete the transaction. Delivery then becomes a matter of prime importance. If the goods are sold, and destroyed before delivery, the loss falls on the seller, if destroyed after delivery, on the buyer. Delivery can only be made of specific goods and has been effected whenever the buyer exercises ownership or control of the specific goods. Whenever anything remains to be performed by the seller on the subject matter of the sale the title remains in the seller and there is no delivery. (See Case No. 51.)

224. Contracts to Sell. These contracts are distinguished from sales in that they are contracts in which the seller *agrees to trans-*

fer the property in goods to the buyer for a price while in a sale he *transfers* the property in the goods.

225. QUESTIONS ON TEXT

What elements must be considered in contracts of sale? What are the requisites of the parties? Distinguish between possession and ownership in reference to capacity to pass title. What are the important provisions in the Statute of Frauds regarding sales? What are the requisites of price in a sale? What may be the subject matter of a sale? What is the difference between a sale and an agreement to sell? Of what significance is the location of the title? When is a sale complete? When may a sale be void for want of delivery?

CHAPTER XXXIX

CONDITIONAL SALES AND RIGHTS OF THE PARTIES

226. CONDITIONAL SALES

1. On Trial
2. Time Payment
3. Sale or Return
4. Sale by Sample
5. Sale by Auction
6. The Bulk Sales Law

227. CHATTEL MORTGAGE

228. WARRANTIES

1. Express
2. Implied

229. RIGHTS OF SELLERS

1. Lien
2. Stoppage in Transit

230. RIGHTS OF BUYERS

1. Specific Performance

231. BREACH OF CONDITION

232. BREACH OF WARRANTY

233. NEGOTIABLE DOCUMENTS

234. C. O. D. SALES

235. QUESTIONS ON TEXT

226. Conditional Sales. 1. *On Trial.* Sales on trial are conditioned upon giving satisfaction for a definite time after the buyer receives the goods, the purpose being to ascertain the correctness of the seller's representations. If these are verified a sale is the result. Title passes not upon delivery but at the expiration of the agreed time, if the purchaser has not in the interval exercised his right to return the goods. (See Case No. 52.)

2. *Time Payment.* Sales are sometimes made, in which the goods are delivered to the buyer who is to pay the purchase price in regular installments, the title to the property however to remain in the seller until the last payment is completed. As between buyer and seller there is no question of fairness in such a transaction, but the rights of an innocent third party may intervene, as when the purchaser sells the goods to the latter before completion of the payments and without notifying him of his lack of title. The question becomes difficult particularly when some States favor the protection of the seller while others favor the innocent purchaser.

3. *Sale or Return.* There may be a sale with delivery of the goods and a collateral agreement for the return or re-sale of the goods to the first owner in the event of certain stated contingencies. If the title passes it is a sale; if title does not pass, it is a contract to sell on trial. In the first case the loss of the property if destroyed falls on the buyer, while in the second case it falls on the seller.

4. *Sale by Sample.* A common way of selling goods is to give a small quantity to the buyer for inspection. There is no undertaking as to quality or grade of the sample, simply that the sample is a fair representation of the bulk. In a sale of this character there are three implied warranties: (1) that the bulk corresponds to the sample in quality, (2) that the buyer shall have reasonable time or opportunity of comparing the bulk with the sample, and (3) that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

When goods are sold by description, they must be as described or the buyer may refuse to accept them.

5. *Sale by Auction (U. S. A.).* In the case of sale by auction—(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3) A right to bid may be reserved expressly by or on behalf of the seller.

(4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such a sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

6. *The Bulk Sales Law.* This law has been enacted in varying forms in a majority of the States. Its purpose is to prevent the fraudulent sale of goods that have not been paid for by the purchaser. For example: A, a retail dealer, buys on credit a bill of merchandise and store fixtures. Later, and before payment has been made on the goods and fixtures, he sells these goods and his business to B. The title has now passed to an innocent purchaser and the creditors of A have no recourse affecting the goods. The bulk sales law attempts to remedy this by requiring the seller to furnish the purchaser with a sworn statement as to all his debts and the names of the creditors. It is the purchaser's duty to protect his interests to notify all of these parties of his intended purchase. The purchaser should require the original bills of the goods purchased and notify these parties to protect fully his purchase.

227. Chattel Mortgage. A chattel mortgage is a conveyance of the title to personal property as security for the payment of a debt or the performance of a promise. Generally, although title is transferred, the mortgagor retains possession, and the debt is evidenced by a note or notes. When the debt is paid the mortgage is of no force; if unpaid, statutory law provides a regular method of foreclosure and sale of the mortgaged property to satisfy the debt.

228. Warranties. A warranty is an undertaking on the part of the seller that the goods possess certain qualities. It differs from a condition in that the latter is an integral part of the con-

CHATTEL MORTGAGE NOTE

		19
Value Received,	after date, for	
	Promise to pay to the order of	
	the sum of	
	Dollars,	
at	with Interest thereon	
at the rate of	annually.	
This Note is secured by a Chattel Mortgage of even date herewith, on personal property in		
and is to bear interest at the rate of per cent per annum after maturity.		
And to secure the payment of said amount hereby authorize, irrevocably, any attorney of any Court of Record to appear for in such Court, to term time or vacation, at any time hereafter, and confer a judgment, without process, in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings and consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof.		
		

tract of sale while a warranty is a separate and independent stipulation on the part of the seller regarding the thing sold. Warranties are classed as express and implied.

1. *Express.* Warranties are express when they are defined by the parties and enter into and form part of the agreement. Expressions of opinion or commendatory statements are not warranties. If the party to whom the warranty is made knows that the statements thereto are untrue, the warranty will be of no force. To be valid, the warranty must be made at the same time as the contract, but an agreement of warranty entered into subsequent to the making of the original contract will be valid if a distinct consideration is given for it.

2. *Implied.* An implied warranty is one which is presumed to have been taken into consideration at the time the original contract is made although not expressly stated. The seller impliedly warrants that he has title and authority to sell the goods. Breach of this warranty permits the buyer to return the goods and demand the return of the purchase price, which he may also do if he is deprived of possession by the lawful owner. The seller of provisions also impliedly warrants that they are wholesome, fit for domestic use, and reasonably fit for the purpose intended.

229. **Rights of Sellers.** 1. *Lien.* The seller's first right is to demand payment as a condition precedent to the delivery of the

goods. He has the right to hold the goods for claims and charges on those particular goods only, and not for other accounts or debts. The seller may exercise his right of lien if in possession of the goods (a) if the goods were sold without a designated credit; (b) where the term of credit has expired; (c) where the purchaser has become insolvent; (d) on part of the goods for payment on all; or (e) on all of the goods for payment of part.

2. *Stoppage in Transit.* This is an extension of the right of lien. As long as the goods are in the hands of a common carrier or warehouseman, who receives them from the seller, they are constructively under the seller's control. The right is exercised by notice to the carrier not to deliver the goods to the consignee but to hold subject to the order of the seller. All expense of stoppage must be borne by the seller and three conditions are necessary before he is justified in its exercise: (1) there must be a balance due on the goods; (2) the goods must be in the hands of an intermediate party; (3) the purchaser must be in financial difficulties. Goods shipped C. O. D. are not subject to the right of stoppage in transit. (See Case No. 53.)

230. Rights of Buyers. The principal right of the buyer is the right to demand possession of the goods, subject, however, to any condition precedent. If the goods are sold for cash, he must first make tender before demanding possession.

1. *Specific Performance.* For failure on the part of the seller to deliver the goods, as a rule, the purchaser must satisfy himself by a claim for damages. In exceptional cases, however, specific performance of the contract may be enforced where damages alone would be inequitable.

Thus, if the particular article is one of an historical nature, as an heirloom, or if the particular goods are not only necessary but are the only available ones, specific performance may be decreed.

231. Breach of Condition. With a breach of condition the contract may be treated as at an end and the buyer is not obliged to receive the goods; if already delivered, he may return them and demand a return of the purchase price. The rule is equitable and

works in favor of either party. The injured party has a claim for damages against the wrongdoer.

232. Breach of Warranty. A warranty being a separate contract, the breach of it does not avoid the sale unless fraud can be shown.

The buyer is not at liberty to return the goods but must seek his remedy in damages for breach of contract. (See Case No. 54.)

233. Negotiable Documents. Sales of goods, fungible goods in particular, are largely evidenced by some form of a receipt, such as warehouse receipts and bills of lading. These documents possess the qualities of negotiable paper except the conditional liability of the indorser. Title is evidenced by these documents, and the title may be transferred by delivery or by indorsement and delivery. (See pages 208 and 209.)

Warranties on Sale of Document (U. S. A.). A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

- (a) That the document is genuine;
- (b) That he has a legal right to negotiate or transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the document, and
- (d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title to the goods represented thereby.

234. C. O. D. Sales. These are sales in which title remains with the seller until the buyer complies with certain designated conditions; as, pays the freight and advanced charges or pays for the goods shipped. He is entitled to examine the goods if the contract allows it.

235. QUESTIONS ON TEXT

What is meant by a conditional sale? Give examples of some kinds of conditional sales. What are the rights of the parties under a chattel mortgage?

Distinguish between a condition and a warranty. What is an implied warranty? Mention some kinds of implied warranty. When can you return the goods and sue for damages? What are some of the seller's rights? What is stoppage in transit and what are the conditions necessary to the exercise of this right? When may specific performance be had? Distinguish between the effect that a breach of warranty may have on a sale and that of a breach of condition.

CHAPTER XL

MISCELLANEOUS TOPICS

236. APPLICATION OF COURT DECISIONS TO FACTS

237. HYPOTHETICAL PROBLEMS

238. MOOT COURT CASES

239. SEARCH QUESTIONS (STATE LAWS)

236. APPLICATION OF COURT DECISIONS TO FACTS

1. Conditional Sales. Facts: Assume that A sold and delivered to B a piano for \$500.00 on the following terms: One hundred dollars was paid in cash and a note for the balance was given by B to A. This note provided that the title to the piano was to remain in A until the note was paid, and that B might take possession of the piano whenever he felt insecure.

• Ruling Cases: *Spooner v. Cummings*, 151 Mass. 313; *McRea v. Merrifield*, 48 Ark. 160; *Ballard v. Burgett*, 40 N. Y. 314; *McIntosh v. Beam*, 47 Ark. 363; *Sanders v. Keber*, 28 Ohio St. 630. (But see *Murch v. Wright*, 46 Ill. 487, and *Stadtfield v. Huntsman*, 92 Pa. St. 53.) *Moyer v. McIntyre*, 43 Hun (N. Y.) 58; and *Wooley v. Geneva Wagon Co.*, N. J. L. 278 X.

- (a) What kind of a sale is this?
- (b) If B never pays the note, can A recover the piano?
- (c) If the conditional vendee, B, sells the piano to C, who bought it in good faith and for a valuable consideration and without notice of the conditional sale to B, can A recover the piano from C?
- (d) If D, a creditor of B, attaches the piano in good faith, can A recover the piano from D?
- (e) If the statute of the State required that A's conditional sale to B should be recorded, otherwise A's title shall not be good against an innocent third party, and if it is not recorded, can A recover the piano from such third party?

2. Warranties. Facts: Assume that A sold a suit of clothing to B and that after B brought the clothing home his wife told him (B) that it would fade. B then took the suit back to A, who then guaranteed the suit not to fade.

Ruling Cases: Chapman v. Murch, 19 Johnson (N. Y.) 290; Eichholz v. Bannister, 17 C. B. New Series (English) 708; Dean v. Morey, 33 Iowa 120; Meyer v. Wheeler, 65 Iowa 390; Kingsley v. Johnson 49 Conn. 462; Salisbury v. Stainer, 19 Wendell (New York) 159; Heyworth v. Hutchinson, L. R. 2 Q. B. 447; and Bryant v. Isburgh, 13 Gray 607.

- (a) Does A's guaranty *after* the sale was made amount to a warranty?
- (b) If during the negotiations of the sale A had represented that the suit of clothing would not fade, would such representation amount to a warranty?
- (c) If A made no representation at any time as to whether or not the suit of clothes would fade, but the clothing did soon afterwards fade, has B a remedy against A?
- (d) If during the negotiations of the sale, A said that in three months the suit will be worth double the amount in order to induce B to buy it, but this statement proved untrue, would such statement be a breach of warranty of value?
- (e) If A had stolen from C the suit of clothing that he sold to B, can C recover it from B, a purchaser for value and without notice of the theft? If C can recover the suit, has B a remedy against A?
- (f) If the suit in question had been sold by sample, would there be an implied warranty in favor of the buyer?

237. HYPOTHETICAL PROBLEMS

1. A promises to give B a horse the next week and fails to do so. Can A enforce the promise?

2. A gives B a horse and the next week asks B to give it back to him. Must B comply with the request?

3. A rents a building from B for manufacturing purposes. When the lease expires B refuses to permit A to remove his machinery. To whom does the machinery belong?

4. A sells a house to B and nothing is said about a hot water heating plant installed in the usual way. Does the heating plant pass with the building?

5. A sells one hundred bushels of wheat to B for 80 cents a bushel, for which it is agreed he shall pay on the first day of the following month. The wheat is sacked up ready for B whenever

he calls for it. B tenders payment according to agreement, but, wheat having risen to \$1.00 a bushel, A refuses to deliver. Can B enforce delivery?

6. A lost a diamond ring which B found and sold to C. C being an innocent purchaser, can A recover the ring? May C recover its value from B?

7. A bought 50 bushels of wheat of B. It was agreed that the wheat should be measured out and paid for the next day. During the night it was destroyed by fire. Whose is the loss?

8. Jones bought wheat, by sample, from Williams at market price. Williams delivered wheat equally as good as the sample, both being worthless. If Jones has paid for the wheat can he recover his money? If Jones has not paid for the wheat, can Williams enforce payment?

9. A consigns goods to B. B fails before receiving them. A stops them in transit and they are attached by creditors of B. Who is entitled to the goods?

238. MOOT COURT CASE

Action: This is an action of assumpsit for damages for breach of a simple contract.

Facts: The facts brought out in testimony are about as follows: Mr. M bought a horse from the Horse Sales Co. on or about August 1, 19—. The horse is supposed to be a "lady's saddle horse." The contract price for the horse was \$275.00; cash \$175.00 and a note at 30 days for the balance. Suit is brought for the balance, and payment of the note is resisted on the ground of fraud based on terms of sale that the horse "is sound." The horse is vicious and kicks on the slightest provocation. The seller expresses the opinion very extravagantly that the horse is just what was wanted, "a lady's saddle horse," a "fine looker," "a good traveler," and as "sound as a dollar."

Issue: Can the Horse Sales Co. recover the \$100.00 balance on the note?

239. SEARCH QUESTIONS (STATE LAWS)

What personal property is exempt from execution? When a defendant files a schedule of property as exempt from execution, what method of appraisement is provided for?

Are there any debts from which no property is exempt? What is the effect of a legal tender of personal property in payment of a debt?

Is there a section of the Statute of Frauds relating to the sale of goods? What is the amount?

What sales are considered fraudulent? What provisions are made for chattel mortgages; acknowledgment, record, sales, any requirements as to the form of the promissory note evidencing debt?

What are the rules of descent in case of death of a person dying intestate?

Does the law recognize the possession of birds and animals as that of personal property? Is the rolling stock of railroads classed as personal or real property? May it be seized on execution? How is the personal property to be valued for taxation? When is it listed for taxation? When to be paid? When sold for non-payment of taxes? Is there an inheritance tax? Are any of the taxes progressive? Any regressive?

What are the requirements of a chattel mortgage? Must the note for the amount of the chattel mortgage recite the mortgage?



EDWARD D. WHITE

Former Chief Justice of the United States; appointed Associate Justice of the Supreme Court in 1894, Chief Justice in 1910. Died 1921.

There are three momentous periods in American jurisprudence: first, constitutional construction, second, constitutional reconstruction, and third, public policy versus consolidation and integration of business interests. The first has its Marshall, the second its Chase, and the third its White. Questions of immense importance to humanity were being settled by the Supreme Court during this time, questions revolutionary in their character in so far as gigantic business enterprises were concerned. The Chief Justice had this to say of the court over which he presided:

"The most powerful court of the world. It is the only one that can nullify an act of the people of the nation, or the people's representatives. Ours is the only nation in which the Supreme Court assumes to be a co-ordinate branch of the government. It is the more remarkable that a popular government should be the one in which the most powerful and the one completely irresponsible department of government has no direct connection with the people."

CHAPTER XLI

BAILMENTS

240. DEFINITION

241. PARTIES

242. CLASSES

243. DEGREE OF CARE

244. TERMINATION OF BAILMENT

245. QUESTIONS ON TEXT

240. Definition. In its wide sense a bailment results whenever a person acquires possession of personal property without title. To this general definition there are a few exceptions which will be noted in due course. More specifically, whenever personal property is delivered to a person for some particular purpose, and after this purpose has been accomplished the property is to be returned to the original party or to a third person, a bailment results. The important essential to be noted is that transfer of possession occurs without transfer of title.

241. Parties. The direct parties to a bailment are two in number: the bailee, the one to whom the property is delivered and who thereby acquires immediate possession; and the bailor, who delivers the goods. Generally the bailor also holds title to the property, but this is not absolutely essential; the bailor may be the bailee of a previous bailment of the same property.

242. Classes. The purpose of the bailment is the performance of some service either upon or by means of the property bailed. Hence bailments may be divided into two general classes: gratuitous bailments, where the services are to be performed free of charge; non-gratuitous bailments, for which there is to be a charge. Non-gratuitous bailments are subdivided into two

classes: pledge and hire, and are for the benefit of both parties. Gratuitous bailments are either for the sole benefit of the bailor, or for the sole benefit of the bailee. They are divided into two classes: deposit, and loan for use.

CARE

<i>Kind of Purpose</i>	<i>Specific Purpose</i>	<i>For Whose Benefit</i>	<i>Care Required of Bailee</i>	<i>Claim for Damages When Bailee Fails to Take—</i>
Deposit	Safe keeping	Bailor	Slight	Slight care
Commission	Work	Bailor	Slight	Slight care
Loan for use	Use	Bailee	Great	Great care
Pledge	Security	Both	Ordinary	Ordinary care
Hire	Use	Both	Ordinary	Ordinary care

243. Degree of Care. One of the most important elements in the consideration of a bailment is the care that the bailee must take of the bailed property while it is in his possession. Degrees of care are conveniently classified as slight, ordinary, and great. Ordinary care is that degree of care which the normally prudent man would exercise toward his own property. Slight care is some care but not so much as ordinary care. Great care is that degree of care which the exceptionally diligent man would exercise and is of higher degree than ordinary care.

244. Termination of Bailment. The bailment may be terminated in several ways. It may terminate by mutual agreement. Where the bailor receives all the benefit, he may demand the return of the property at any time provided the bailee has no incidental charges. Where the bailment is for the benefit of the bailee, the bailor may demand the return of the property at the expiration of the time. Destruction of the property terminates the bailment.

245. QUESTIONS ON TEXT

Define bailment; bailor; bailee. What kind of property may be the subject of a bailment? How and when is a bailment terminated? Name the classes and subdivisions of bailments with examples. Define and distinguish between the different degrees of care.

CHAPTER XLII

BENEFITS OF BAILMENT

246. WHERE BAILEE RECEIVES WHOLE BENEFIT

1. Care
2. Return of Property
3. Duty of Bailor

247. WHERE THE BAILMENT IS FOR THE SOLE BENEFIT OF BAILOR

1. Deposit

248. BAILMENT FOR BENEFIT OF BOTH PARTIES

249. PLEDGE OR PAWN

1. Possession
2. Duties and Rights of Pledgee
3. Rights of Pledgor
4. Remedies

250. PAWNBROKERS

251. BAILMENT OF HIRE

252. HIRING OF USE

253. HIRING OF CARE AND CUSTODY

254. HIRING OF LABOR

255. LIEN

256. QUESTIONS ON TEXT

246. Where the Bailee Receives the Whole Benefit. Loan for Use. This is a bailment solely for the bailee's benefit and is simply the loan of a thing to him for his personal use.

1. *Care.* Since the bailee receives all of the benefit he is obligated to exercise the highest degree of care while the property is in his possession and is held strictly accountable to the bailor for the return of the property according to the bailment contract.

2. *Return of Property.* It is the duty of the bailee to return the property at the agreed time, with any natural increase, and in the same condition as received subject only to ordinary wear and tear, unless otherwise stipulated in the agreement. He has a claim for reimbursement for any extraordinary expenses incurred in safeguarding the property for the benefit of the bailor, and under certain conditions may retain the property until such claim is paid, but he has no right to retain the property for any other claim against the bailor.

3. *Duty of Bailor.* The chief obligation of the bailor is to allow the bailee free and unobstructed use of the property bailed.

247. Where the Bailment is for the Sole Benefit of Bailor.

1. *Deposit.* This is the oldest kind of bailment. In it the bailor delivers property to the bailee for safe-keeping without charge. The bailee obligates himself to return the property upon demand, together with any increase or accumulation, and to comply with any special instructions in regard to the bailment. He is not obliged to undertake such a bailment; but if he does so he assumes the liability incident to it. He may, however, return the property to the bailor at any time and has a right to reimbursement for any expense incurred incident to the bailment. Since the benefit is entirely for the bailor, only slight care is exacted from the bailee, but the latter is liable for negligence.

248. Bailment for Benefit of Both Parties. There are two classes of bailment in which mutuality of benefit is present: the bailment of pledging and the one of hiring.

249. Pledge or Pawn. This bailment is the delivery of personal property as security for the payment of a debt. The debt may be absolute or conditional, the bailor being debtor or surety, and the bailee may hold the pledged property until the debt and all proper charges are paid.

1. *Possession.* The pledgee must have actual or constructive possession of the property. If he surrenders his possession to the pledgor, the bailment is at an end, but the debt is not thereby cancelled.

2. *Duties and Rights of Pledgee.* The benefit of the bailment being mutual, the pledgee is required to exercise ordinary care only and is liable for loss occasioned by lack of proper care. The pledgor, however, in an action to recover damages for loss, must show that such loss was caused by the negligence of the pledgee. When the bailment is terminated by the payment of the debt, the pledgee must return the pledge to the bailor together with any natural increase by way of dividends, interest or offspring of animals. The main right of the bailee is to hold the property for the payment of the debt, a right of possession only. The debt, however, must be a legal one; if illegal, the bailment is voidable, if not void.

3. *Rights of Pledgor.* The pledgor still retains title to the property. He may redeem by paying the debt and thereby terminating the bailment. He may sell, transfer or mortgage his title which, however, still is subject to the rights of the bailee, and the purchaser or grantee takes subject to these rights.

4. *Remedies.* Upon default of the pledgor the pledgee has the choice of several remedies. He may sue for the debt. He may sell the property after proper notice and apply the proceeds to the satisfaction of the debt, and if there is a deficit he may sue for the balance; if there is a surplus, it must be accounted for to the pledgor. He may also ask for a decree of foreclosure. He cannot appropriate the property in satisfaction of the debt.

250. Pawnbrokers. The pawnbroker is a type of professional pledgee and his business is largely regulated by statute. At common law his rights were that of the ordinary pledgee and he incurred the same obligations and liabilities.

251. Bailment of Hire. Bailments of this class are divided as follows: Hiring of use; hiring of care and custody; hiring of labor; and hiring of carriage.

252. Hiring of Use. In this bailment the bailee secures the use of personal property from the bailor for a definite time, for which he pays a consideration. The liveryman is an example of this type of bailor. The bailee is obligated to confine his use of the

property to the terms of the contract and to exercise ordinary care.

253. Hiring of Care and Custody. This type of bailment forms the bulk of the business of the warehouseman, the wharfinger, the safe deposit company and the agister. The benefit being mutual, ordinary care is required of the bailee whose liability does not begin until he has acquired actual possession of the property and ends upon delivery. Similarly, in the event of loss, negligence on the part of the bailee must be shown by the bailor to warrant recovery of damages.

254. Hiring of Labor. The primary duty of the bailee in this class of bailment is to perform the services agreed upon in good faith. He must use ordinary care in the safe-keeping of the property and must exercise reasonable skill in the performance of his duty. He is entitled to his compensation for work performed and for material used even if the property bailed is subsequently destroyed through no fault of the bailee. Even if the work had been but partly done he is entitled to a proportionate share of the compensation.

255. Lien. In general, every bailee for hire has a right to hold the possession of the bailed goods until his charges have been paid. This is known as the right of lien, and to retain this right possession is essential. As soon as the bailee loses possession of the property his right of lien is lost. At common law all that the bailee could do was to retain possession of the property, he could not dispose of it, but in the majority of States statutes have been passed permitting the sale of the bailed property under certain conditions and restrictions. (See Case No. 55.)

256. QUESTIONS ON TEXT

Describe a loan for use, the degree of care required of the bailee and the duty of the bailor. Define a deposit, and state the rights and duties of bailor and bailee. Define a pledge or pawn. What are the duties and rights of the pledgee? What are the rights of the pledgor? What are the remedies of the pledgee? Classify and define the bailments for hire. Give examples. What is meant by "lien" and how does it operate?

CHAPTER XLIII

SPECIAL CLASSES OF BAILMENTS

257. INNKEEPERS

1. Definition
2. Guests

258. RIGHTS AND LIABILITIES OF INNKEEPERS

1. Duty
2. Liability
3. Lien

259. COMMON CARRIERS

1. Rights and Obligations
2. Compensation
3. Liabilities
4. Special Contracts

260. BILL OF LADING

261. TERMINATION OF RISK

262. CARRIERS OF PASSENGERS

1. Rights and Obligations
2. Liabilities

263. STATUTORY REGULATIONS

264. SPECIAL CASES

1. Safety Deposit Vaults
2. Telegraph and Telephone Companies
3. Interstate Commerce Act

265. QUESTIONS ON TEXT

257. Innkeepers. 1. *Definition.* An innkeeper is "one who holds himself out to the public as engaged in the business of keeping a house for the lodging and entertainment of travelers, their horses, and attendants, for a reasonable compensation." In

order that the liability of an innkeeper may attach, several conditions must be present: (1) he must make a business of receiving guests; (2) it must be for a regularly established compensation, and (3) the offer of accommodations must be to the general public. Boarding houses, apartment hotels, steamships, and sleeping-cars are not inns and the innkeeper's liabilities do not attach to their operators.

2. *Guests.* A guest is a bona fide transient who offers himself to an innkeeper for accommodation and is accepted as such. A person invited to dine with the innkeeper is not legally a guest, neither is one who makes a special contract with him for entertainment. (See Case No. 56.)

258. Rights and Liabilities of Innkeepers. 1. *Duty.* The innkeeper is in duty bound to accept all guests who offer themselves for entertainment subject to the following exceptions. He may refuse to accept one who is disorderly, or suffering from disease, or one who cannot pay in advance.

2. *Liability.* The innkeeper's liability is that of an insurer of such goods of his guest as are reasonably necessary for the latter's comfort and enjoyment during his journey; and for other goods left in his keeping he is held merely as an ordinary bailee. Statutes in various States have modified this liability under certain conditions.

3. *Lien.* In order to secure the innkeeper for his charges, he is given the right of lien. Under common law this was simply the right to hold the guest's baggage until payment was made; statutory law, however, gives him the right to sell, deduct charges, and turn the balance, if any, over to the delinquent guest.

259. Common Carriers. A common carrier is one who makes a business of carrying for the general public goods from one place to another for compensation. The common carrier differs from the private carrier in that the latter limits his customers to certain individuals or classes of persons, the common carrier serves any and everybody. He may specify the class of goods to be carried, the route to be taken, or the time, but if he holds himself out in common to all persons who choose to employ him, he is a

common carrier. Illustrations are: railroads, steamship lines, express companies, truckmen, cartmen, and ferryboats.

1. *Rights and Obligations.* A common carrier is a carrier for the general public. However, he may limit the kind of goods conveyed to a particular line, as for instance, cattle. He may select his mode of carriage, his route, and his time. If his conveyances are full he may refuse to accept any more, except in certain States which have passed certain regulating statutes in this regard. He is not obliged to accept dangerous or suspicious goods.

2. *Compensation.* The common carrier may demand payment in advance. If unpaid he may exercise his right of lien for his charges, retaining possession of the goods until they are paid. If the goods have been accepted by the consignee he may look to him for the transportation charges as well as to the consignor, but can get but one satisfaction.

3. *Liabilities.* From the time of acceptance of the consignment until its tender to the consignee, the common carrier is liable as an insurer of the goods. Relief from this liability is granted only when the loss was caused by (1) the act of God, (2) the act of the public enemy, and (3) the inherent characteristics or defects of the goods themselves. Any act of the bailor inconsistent with the rights of the carrier will terminate the contract and release the latter.

4. *Special Contracts.* The common carrier is permitted to limit or lessen his liability by special contract but this must not excuse him or his agents from losses occasioned by carelessness or negligence.

260. **Bill of Lading.** A bill of lading is a written contract given to the shipper which is also a receipt for the goods. It is discussed under the heading of Negotiable Paper.

261. **Termination of Risk.** The risk begins when the goods have been accepted, actually or constructively, by the carrier, and ends upon tender, or when notice of arrival has been given to the consignee, after which the carrier's liability changes to that of a warehouseman.

262. Carriers of Passengers. A common carrier of passengers is one who undertakes for hire to carry all persons who apply for passage. A passenger is one who, not being in the service of the carrier, is entitled to travel in a conveyance for the public under contract with the carrier, and who is within the carrier's charge under such contract.

1. *Rights and Obligations.* The carrier must accept any person who presents himself for transportation subject to the following restrictions: The carrier may demand payment in advance; he may make reasonable rules and regulations in reference to time and points of call. If his vehicles are filled he may refuse to accept any more. The carrier must furnish safe vehicles and must see that these and other necessary appliances, including landing places, are kept in a safe condition. He is required to exercise a very high degree of care and skill in carrying out the contract of carriage.

2. *Liabilities.* If injured or killed through the negligence of the carriers, the passenger, or his personal representative, may recover damages. The passenger must comply with all reasonable regulations of the carrier for the safety of the passengers, and if negligence on his part contributed to the injury the passenger cannot recover. (See Case No. 57.)

263. Statutory Regulations. Common carriers are governed and regulated by both Federal and State statutes which are highly technical and complex, and which are constantly being changed.

264. Special Cases. 1. *Safety Deposit Vaults.* What is the liability of a bank or banker in case of the deposit of securities or other valuables? This is a very important question, as nearly everyone has occasion for making a special deposit of securities with a bank, or for renting a safety deposit box.

To secure full liability on the part of the banker, for example, B deposited with his banker securities together with a complete list of them. An Arkansas judge instructed the jury that the bank was bound to exercise the same care of these securities as it did of its own securities. The Supreme Court reversed this

case, saying the instructions were erroneous, and laying down the following:

"This instruction does not correctly declare the law. Proof of this degree of care is, of course, competent to rebut the presumption of gross negligence arising from the loss of the bonds, but it is not conclusive of the fact, as the bank might have been grossly negligent in the care of its own property."

In reference to safety box renters, in an Illinois case on the point, the Court said:

"Although one who hires a box in the vaults of a safety deposit company may keep the key himself, yet the company, without any special contract to that effect, will be held to at least ordinary care in keeping the deposit."

2. *Telegraph and Telephone Companies.* In some jurisdictions these companies are classed as common carriers and are not so held in others. They are classed as common carriers under the Interstate Commerce Act. They are like common carriers in that they transact business for the general public and their rates are subject to public regulations.

Transactions concluded over the telephone do not satisfy contracts relating to the Statute of Frauds, but a telegram does satisfy the requirements of the law relating to written agreements. A message sent to a telegraph company by use of a telephone complies with the statute because the telegraph company is acting as your agent through the medium of the telephone. The signing of the sender's name to the message makes the telegram a written instrument.

The contract for service is between the company and the sender. Failure to act is a breach of contract. The receiver who is damaged may have an action in tort. Telegraph companies are not permitted to give out the contents of messages except of course on order of a proper court.

3. *Interstate Commerce Act.* Under provision of the Constitution of the United States the Congress has power "to regulate commerce with foreign nations and the several States." Under this provision Congress has passed a number of regulatory laws. The chief one is known as the Interstate Commerce Act. A brief summary of this act is as follows:

It prevents the discrimination of the large shipper against the small shipper. It prevents pooling and division of receipts. It provides that proportionate rates shall be charged for long hauls and short hauls on the same line. It prevents combinations that interfere with the transportation of freight. It provides that the schedules of rates shall be published. It prevents carriers from owning mines and then engaging in competitive business with other firms. It prevents the issuing of passes except to officials of carriers. Its provisions are carried out by the Interstate Commerce Commission. The commission sits as a court, summons witnesses, conducts trials, and may award damages. The Interstate Commerce Act places the liability of carriage on the initial carrier, who may in turn hold the offending company. This act controls in all interstate commerce, leaving intrastate laws to the particular State.

Several other federal laws of a regulatory character have been passed from time to time; viz., the Sherman Anti-Trust Act 1890; Clayton Act 1914 "to supplement existing laws against unlawful restraints and monopolies." Labor is declared not to be a commodity; Trade Commission Act 1914 to regulate trusts or great business combinations, in particular aimed at unfair methods; Federal Farm Loan Act 1916 to handle farm loans which require special attention and longer time of credit than the Federal Reserve Board can allow; Webb Export Act 1918, combinations solely for export trade, should not be construed as illegal under the Sherman Anti-Trust Law; Transportation Act 1920 permits carriers to consolidate under supervision of the Interstate Commerce Commission. This plan contemplates the consolidation of the carriers into nineteen competing systems.

In 1925 was passed the United States Arbitration Act making "valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, etc." This act does not make it necessary to include agreements to arbitrate in contracts, but if such provisions are included they become as binding as any other provision.

These acts are being changed from time to time, consequently only brief notice is taken of them in a text of this size. The big business organization finds many provisions that must be ob-

served in the transaction of business. Copies of these acts may be secured by the student.

265. QUESTIONS ON TEXT

Define an innkeeper. Distinguish between a boarding-house keeper and an innkeeper, a guest and a boarder. What are the obligations of an innkeeper? His liabilities? How may he limit his liability? What is his right of lien? Define common carrier. Distinguish between common and private carrier. What are the obligations of a common carrier? His rights? When does the carrier's risk begin and when does it end? Discuss undertaking, rights, and liabilities as a carrier of passengers.

CHAPTER XLIV

MISCELLANEOUS TOPICS

266. APPLICATION OF COURT DECISIONS TO FACTS

267. HYPOTHETICAL PROBLEMS

268. MOOT COURT CASE

269. SEARCH QUESTIONS (STATE LAWS)

266. APPLICATION OF COURT DECISIONS TO FACTS

1. Bailments and Carriers. Facts: A shipped goods over the B railroad. The goods are stolen while in transit.

Ruling Cases: *Elliott v. St. Louis, etc., Ry. Co.*, 76 Mo. 518; *Hale v. N. J. Steam Navigation Co.*, 15 Conn. 539; *Ballentine v. N. Mo. R. R. Co.*, 40 Mo. 491; *K. v. Am. Ex. Co.*, 21 Wis. 21; *Miltimore v. Chicago, etc., Ry. Co.*, 37 Wis. 190; *Stiles v. Davis*, 1 Black 101; *Bliven v. R. R. Co.*, 36 N. Y. 403; *Steiger v. Erie R. R. Co.*, 5 Hum. 345; *Judson v. Western, etc., Corp.*, 6 Allen, 486; *Davidson v. Graham*, 2 Ohio St., 131; *Maynard v. R. R. Co.*, 71 N. Y. 180; and *R. R. Co. v. Morrison*, 19 Ill. 336.

- (a) Is the B railroad liable to A for the loss of the goods?
- (b) In the above case, if the goods had been destroyed by fire, would the B railroad be liable to A for the loss?
- (c) In the above case, if the goods had been destroyed by an earthquake while in transit, would the B railroad be liable for the loss?
- (d) In the above case, if the train carrying the goods had been captured by an invading army of another nation with which A's nation is at war, would the B railroad company be liable for the loss?
- (e) In the above case, if the goods in transit had been destroyed by a mob, would the railroad company be liable to A for the loss?
- (f) In the above case, if the goods while in transit had been attached by a sheriff, would the railroad company be liable for non-delivery of the goods?
- (g) If A improperly packed or marked the goods so that it is not apparent to the railroad company, and as a result of it they are destroyed or damaged, can he hold the carrier liable for the loss?

- (h) If A's goods are injured owing entirely to the carrier's deviation from the usual route, has A an action for loss?
- (i) Can the B railroad company, by contract with A, the shipper, relieve itself from liability for negligence?

2. Innkeepers. Facts: A bringing with him \$4,500.00 in gold dust to B's hotel, the What Cheer House, in San Francisco, Calif., was accepted as a guest. Pursuant to notice that the hotel-keeper would not be liable for such goods left in guests' rooms, A turned the gold dust over to be put in the hotel safe. It was put in the safe. The safe was robbed, with violence, by persons not in the hotelkeeper's employ.

Ruling Cases: *Pinkerton v. Woodward*, 33 Cal., 557; *Rockwell v. Proctor*, 39 Ga. 105; *Fay v. Pacific Imp. Co.*, 93 Cal. 253; and *S. v. S.* 3 N. Y. 588.

- (a) Is B liable for the theft?
- (b) If B's servants had stolen the gold dust, would B be liable for the theft?
- (c) If A had not deposited the gold dust in the hotel safe, and it had been stolen from his room, would B then have been liable for the theft?
- (d) If, after depositing the gold dust in the safe, the hotel, including safe and contents were destroyed by a flood, would B be liable for the loss of the gold dust? How if destroyed by fire?
- (e) If the gold dust had not been stolen from the safe and A had been unable to pay his hotel bill, would B have a lien on the gold dust for the unpaid hotel bill?
- (f) If B's What Cheer House had been a lodging house, instead of an hotel, would B have been liable if the gold dust had been stolen?

3. Pledge. Facts: A owed B \$200.00. He then borrowed of B \$500.00 due in one year. As security for the loan of \$500.00 A pledges to B five shares of stock, five industrial bonds, one horse, one cow and a sewing machine.

Ruling Cases: *McArthur v. Hewett*, 72 Ill., 358; *M. S. Bank v. Bangs*, 84 Ky. 135; *Gillet v. Bank of America*, 160 N. Y. 549; and *Union Trust Co. v. Rigdon*, 93 Ill., 458.

- (a) During the life of the pledge has B a right to use the horse? the cow? the sewing machine?
- (b) Can B during the life of the pledge use the bonds and the stock for collateral security in borrowing money?
- (c) When the loan for \$500.00 matures, A pays it and demands a return of the bonds, stock and chattels pledged. B refuses to return these

- until the prior debt of \$200.00 is paid. Has B a right to hold them until the prior debt is paid?
- (d) Has B, the pledgee, a right to undisturbed possession of the articles pledged?
 - (e) After the pledgor has made default in paying the debt secured, what may the pledgee do to obtain payment of the debt?
 - (f) If, however, the pledged property consists of notes, bills, or bonds (as is the case with a part of the property pledged in the above problem) which will soon become due, may the pledgee, in the absence of a special power authorizing him to do so, sell the security so pledged either at public or private sale upon default of payment of the original debt by the pledgor?
 - (g) If the bonds are called at 105 as is frequently the procedure in regard to maturities, must the pledgee turn in the bonds pursuant to the call? What is to be done with the extra amount collected, that is, the five points?
 - (h) The horse contracts glanders and the State veterinarian orders the horse destroyed. Is the pledgee responsible for the loss?
 - (i) The cow becomes sick and the veterinarian charges \$10 for fees, the pledgee pays the bill. May he recover from the pledgor? May he hold the cow on the right of lien if the pledgor refuses at the termination of the period of the pledge, viz., one year? Suppose a week later the pledgor offers the \$10 and demands the cow, but the pledgee now includes a board bill for one week?

267. HYPOTHETICAL PROBLEMS

1. A delivers wheat to a miller and is to receive a proportionate amount of flour, not necessarily from his own wheat. The wheat is destroyed by fire. On whom does the loss fall?

2. In the above case A is to receive the flour made from his own wheat. Who sustains the loss?

3. A leaves his horse in B's care and the horse is injured by gross negligence on B's part, B receiving no compensation. Can A recover damages?

4. A leases his horse to B for a consideration. B leaves his own horse untied and it kicks and injures A's horse. Can A recover damages in an action at law?

5. A consigns goods to B to be sold on commission. B does not sell the goods but holds them for a preexisting debt which A owes him. Can A recover the goods?

6. Jones borrows money from Smith and leaves his watch as security. What is the nature of the bailment?

7. Jones delivers horses to Smith to be kept through the summer. Smith pastures the horses near the railroad. Smith's hired man leaves the gate to the pasture open and one of the horses gets on the track and is killed. Whose loss is this?

8. If, in the above case, the horse had leaped over a lawful fence instead of passing through an open gate, whose is the loss?

9. A delivers mahogany to B, a cabinet maker, who agrees to make him a set of furniture for \$300 to be paid for when the furniture is completed. The work is half done and the wood and completed furniture is stolen. On whom does the loss fall for the wood? For the completed furniture?

10. A traveling salesman for a jewelry house is a guest of B, an innkeeper, and delivers his sample case to B for safe-keeping. The sample case and jewels are stolen. Under what circumstances, if any, can B escape paying damages?

11. A common carrier receives goods for transportation and is robbed. Who stands the loss?

12. A flood destroys part of a railroad embankment so that fruit in transit is delayed and damaged. On whom does the loss fall?

13. A street car is running unduly fast when a passenger becomes frightened and jumps off. Who is responsible for the injury?

14. A is riding in a railroad train, in a place regularly provided for carrying passengers, and is injured by a stone thrown by a strike sympathizer. Can he recover damages from the railroad company? How, if A had been stealing a ride on the trucks?

268. MOOT COURT CASE

Action: This is an action of *indebitatus assumpsit* (an implied contract).

Facts: A delivered to B a certain amount of lumber to be used in the construction of a cabinet. During the time of construction and before completion, the shop was destroyed by fire and with it the material used and unused. B brings suit for the recovery of wages and material, trimmings, etc. A joins in suit by denying B's claim and asks pay for the material furnished and used.

The facts are that A delivered enough material for three cabinets

and B agreed to buy the material and supply one cabinet from material for A at a price of \$200.00. B cut up all the material at once and started to make up the three cabinets, but is of the opinion that he was to buy the material for two cabinets and charge for the work on one. He contracted to sell a cabinet to C and D at \$225.00 each. The amount of work and special material on each cabinet is approximately \$160.00. The material in each cabinet is estimated at \$60.00.

Issue: Can B recover for wages and material?

269. SEARCH QUESTIONS (STATE LAWS)

Is there any punishment prescribed for a bailee who converts the thing bailed to his own use?

In what way may an innkeeper limit his liability as to valuables belonging to his guests? For what can he not escape liability by notice? What is the nature of the lien on baggage or horses? What requirements as to doors of hotels, etc.? What are the landlord's rights as to unclaimed baggage? When?

Are there any restrictions in regard to two or more railroads combining? What is said about sinking fund? Fencing the right of way? Crossings? Warning signs? Freight and passenger cars on same train? Must the company give the passenger a check for baggage delivered? What is the law in regard to baggage smashing?

How are warehouses classified, and are they under State control? What provision is there for inspection? Separate bins for grain? What restrictions in regard to warehouse receipts? What is its standing in regard to negotiability? Is coloring or bleaching grain permitted?

Who are pawnbrokers? Rate of interest allowed? Penalty for violation? What books kept and reports made? Is there a State loan society?

What is the liability of a carrier on the termination of the carriage?

CHAPTER XLV

CORPORATIONS

270. INTRODUCTION

271. DEFINITION

272. PERPETUITY

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2. Private
3. Quasi-Public

274. HOW CREATED

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2. By Special Statutes

275. CORPORATE NAME

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279. LIABILITY OF STOCKHOLDERS

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4. To Inspect Books

283. RIGHTS

284. TRANSFER OF STOCK

285. HOW BUSINESS IS CONDUCTED

286. MEETING PLACE

287. QUESTIONS ON TEXT

270. Introduction. A corporation is a business organization that facilitates the assembling of capital in large or small amounts and centralizes the conduct of the business in the hands of a few. Its special advantage is the limiting of the liability of each investor to the amount he promises to contribute.

271. Definition. It is defined by a great jurist as "an artificial being, invisible, intangible, and existing only in contemplation of law."

272. Perpetuity. Unless specifically limited by statutory enactment a corporation may exist forever, and this is one of the chief reasons why the corporation is such a popular commercial institution at the present time. The original members of a corporation may die or transfer their interests and new members take their places without affecting the continuity of the enterprise. For example, in the Dartmouth College case where there were no statutory limitations as to life in the charter, it was held that the State may not interfere with its life, as the charter is a contract and the Federal Constitution provides that a State may not impair an existing contract. Because of this ruling States generally limit the life of a charter to say twenty years. The peculiar attribute of a corporation is the franchise which may be the right to exist as a corporate business enterprise, or it may be a privilege, such for example, as a right of way enjoyed by a railroad.

273. Classes. 1. *Public.* A public or municipal corporation is one created for political purposes. For example, cities and counties are public corporations organized to carry on the business of government for the people.

2. *Private.* This is an association of individuals for the purpose of conducting some business enterprise for profit. For example, our insurance and banking establishments and many mercantile firms large and small are private corporations. Their powers are

limited to those expressly granted by the State and such other implied and understood powers as are necessary to their operation and existence. All other powers are denied. In some States private corporations are classed as for pecuniary profit and not for pecuniary profit.

3. *Quasi-Public.* The quasi-public corporation is, as a matter of fact, a private organization, but this distinction may be pointed out: since it enjoys a certain public right or franchise to the exclusion of other companies, the law construes its rights and duties more strictly and favorably to the public as against the corporation. Examples are city transportation lines, electric light and gas companies, to which are granted exclusive privileges or franchises.

274. How Created. There are two general ways of creating corporations, namely, by general statutes and by special statutes.

1. *By General Statute.* This is the way of creating the majority of corporations that are today doing business as such. The legislature, national or State, has enacted certain statutes and the interested parties apply for permission to organize a corporation under the statute law. Each State has an official whose business it is to supervise the organizing of corporations and when all the statutory provisions are complied with a charter is granted.

2. *By Special Statute.* This was a frequent way of securing a charter, that is, by special legislative enactment, but at present is little used as many State constitutions contain provisions against such methods. Congress has power to grant charters by special legislation but little use is made of the power.

275. Corporate Name. It is one of the requirements that a name be selected by those asking to be incorporated. This is the name under which it conducts business and under this name it sues and may be sued. The name must not be changed except by permission of the State. Generally no two corporations may have the same name, at least in the same State. The name may be names of persons, as Jones, White & Co., or indicative of the business, as the American Grain Co.

276. Capital Stock. The capital stock of a corporation consists of the amount of share interests issued or to be issued to the shareholders. It may be paid for in money or other property. The shares are usually one hundred dollars each face value, and in accordance with the law may be increased as desired.

277. Subscription. A subscriber is one who signs for a number of shares. His interest is a proportionate part of the capital stock. Upon the payment of the amount of the subscription, the subscriber becomes a stockholder and is entitled to a stock certificate as evidence of this fact. The subscription signed is evidence of a contract.

278. Kinds of Stock. 1. *Common.* Common stock is the most usual kind issued, and is entitled to its per cent of the earnings when a dividend is declared. The holders of this kind of stock are entitled to vote at all stockholders' meetings, each one being entitled to as many votes as he has shares of stock.

2. *Preferred Stock.* This class of stock stands higher in degree as a security than does the common stock. The preference of rating may be in regard to dividends or assets or both. The dividend rate on preferred is named and is shown on the certificate. Both kinds of stock may be issued at the same time, or the preferred may be issued later. If both kinds are issued at the same time, the common is at times used as a bonus for selling the preferred and some of the common used for organization purposes. This results in the common stock being what is known as watered stock. If another issue of preferred stock is issued, it may be classed as prior lien preferred stock which rates higher than the first issue of preferred. Preferred stock, from a dividend standpoint, is classed as cumulative and non-cumulative. In preferred stock a passed dividend is carried over to the following year and is in the nature of a lien against the surplus until paid. For example, a preferred stock carries a $6\frac{1}{2}\%$ dividend requirement. If the dividends were passed for two years there would be a claim of thirteen per cent in favor of the preferred stock to be paid before the third year's dividend could be considered.

Preferred stock does not carry the voting privilege unless so

stated in the certificate, or is so declared by statute. (See Form page 276.)

3. *Watered Stock.* This is an inflation of the capital stock of a company by issuing extra stock to the stockholders, nothing in return being given for it. It is frequently issued so as to cover up large dividends, or to make the capitalization of the business such that the income is measured by the current rate of interest. The following form illustrates watered stock:

BALANCE SHEET

Assets	100,000.00	Common Stock	50,000.00
		Preferred Stock	50,000.00

The above illustrates the relation of the capital stock of a company and the assets. In this case the assets are valued as of the date of incorporation and equal to the combined stock issue.

BALANCE SHEET

Assets	200,000.00	Common Stock	100,000.00
		Preferred Stock	100,000.00

The above is an illustration of how watered stock is created. In this case a syndicate, three or four owned the assets valued at \$100,000.00. They turned over these assets, sold them to the directors of the corporation at a valuation of \$200,000.00, probably receiving the common stock in payment as a bonus. The common stock is water in this case. The only way that watered stock can be detected is to compare the amount of stock with the value of the net assets. Again, this company may develop such a profitable business that the surplus may in time equal the amount of the purchase. The water has then disappeared, or in the first example, the assets may depreciate in value so that the charge may be made that the stock is watered. (See Case No. 58 a-b.)

279. Liability of Stockholders. The subscriber for stock is liable for the par value of the shares subscribed for, and in the absence

of State law to the contrary, assumes no liability beyond this. His property in excess of this cannot be taken, as in partnership, to pay the debts of the corporation. National bank stock carries a double liability. This is also the rule in some States in regard to State banks.

280. Holding Company. This is a corporation that is organized for the purpose of controlling several other companies. It is in the nature of a financing concern. If this company holds fifty-one per cent of the stock of the associated companies, it has control of its activities and can elect a majority of the directorate.

The Middle West Utility Company of Illinois is a holding company. Its chief function is to finance and organize public utility groups in various sections of the middle west.

281. Trusts. This is a somewhat uncertain term applied to large corporations that enjoy privileges because of control of prices or of the supply of goods. "The consensus of opinion today is that trusts are inevitable and economical but in the highest degree dangerous unless they are so regulated as to prevent abuse and to turn their economies to the advantage of the public." Many regulatory laws have been passed by both the state and national governments. Many trusts are holding companies. This term is likewise used in the banking business wherein the banks are organized so as to permit them to act as trustees for estates and funds.

282. Rights of Stockholders. 1. *To a Certificate.* When a subscriber pays for his subscription to the stock, he is entitled to a certificate showing his ownership of the stock. It is his evidence that he is a stockholder, and shows the number of shares he owns. (See Form page 277.)

2. *To Sell.* Since the shares of stock are considered property, the owner has a right to sell and transfer his shares to another. The by-laws generally specify how this transfer shall be made effective.

3. *To Vote.* The common law gives the owner of stock, as it appears on the register, the right to vote. It is a settled rule to

allow as many votes as there are shares in the organization. Generally only the owner has this right; but there are several cases where one may hold a certain relationship which carries the right to vote stock, as, a pledgee (his stock is registered in his name), trustees, executors and administrators. A corporation is not permitted to vote its own stock; for example, it cannot vote such stock as may have been taken up by the company, or treasury stock that has not been sold. Cumulative and proxy voting are creations of the statute law.

4. *To Inspect Books.* "According to the decided weight of authority, a stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose, and that, if this right is refused by the officers in charge, a writ of mandamus may issue in the sound discretion of the court, with suitable safeguards to protect the interests of all. It should not be issued to aid the blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court; but the writ should issue as a matter of course, although even then, doubtless, due precautions may be taken as to time and place, so as to prevent interruption of business or other serious inconveniences." This is also the law of partnership.

283. Rights. When an increase is made in the capital stock of a company, it is customary to issue to each stockholder a right of purchase of new shares in proportion of the new issue to the old capital stock. Each stockholder receives a warrant entitling him to the new stock on the payment of the issuing price, usually par. For example, The American Telephone and Telegraph Company in 1924 increased its capital stock by twenty per cent. Each stockholder was issued a right of one-fifth for each share of stock owned. If he owned twenty-six shares he got twenty-six rights, or a warrant reading for five shares and one-fifth of a share. As no certificate of stock will be issued for a fraction of a share, holders of fractional rights either sell or buy fractional rights to equal a share. The new stock was issued at par as of August 1,

1924. The New York Stock Exchange on July 31, 1924, quoted the stock as follows:

American Telephone & Telegraph, open 125 $\frac{1}{4}$, close 125

do Rights . . . open 4 $\frac{7}{16}$, close 4 $\frac{3}{8}$

If the stockholder does not desire to subscribe for the new stock, he may sell his rights. (See Case No. 59.)

284. Transfer of Stock. The certificate of stock represents the stockholders' holdings, and may be assigned to another in the usual way.

CERTIFICATE OF TRANSFER

For Value Received I hereby sell, assign and transfer unto <u>J. W. Caldwell</u> <u>Twenty</u> Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint <u>Allen K. Browning</u> Attorney in fact to transfer the said stock on the Books of the within named Company with full power of substitution in the premises. Dated <u>May 21, 1925</u> In Presence of <u>A. D. [Signature]</u>	<u>AB Brown</u>	Notice. The Signature to this assignment must correspond with the name as written upon the face of the Certificate (over) particular without addition or enlargement or any change whatever.
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285. How Business is Conducted. Since one of the objects of the corporation is to draw capital from a large number of investors and from various parts of the country, it is evident that it would be impossible for the stockholders to be directly interested in the active management of the enterprise. Therefore resort is had to a body of men selected from among the stockholders and known as directors. The board of directors organizes itself and elects

CERTIFICATE OF STOCK

INCORPORATED UNDER THE LAWS OF THE STATE OF WYOMING

THE EDISON ELECTRIC COMPANY

COMMON STOCK \$ 6,000,000

PREFERRED STOCK \$ 4,000,000

SHARES \$ 100 EACH

No. 43

PREFERRED STOCK

25 SHARES

This is to certify that
*Twenty-five**Ed. Fredrick*

Shares of One Hundred Dollars each of the PREFERRED Capital Stock of
THE EDISON ELECTRIC COMPANY, a corporation under the laws of the State of Wyoming, transferable only on the books
of said Corporation, in person or by duly authorized representative upon surrender of this certificate duly endorsed
at its Los Angeles California office.

The stock evidenced hereby is part of an authorized issue of Preferred Stock of said Corporation aggregating
Four Million Dollars. The relations and respective rights of the Preferred and Common Stock of said Corporation are
fully set forth in paragraph Fourth of its Certificate of Incorporation, in the following language:

To: Said preferred stock shall be preferred in the final distribution of the assets of the company up to full payment of the face thereof with cumulative dividends as hereinafter
named. The remainder of the assets of the Corporation shall next be applied to the payment of the common stock up to the full value of the face thereof and if there remains remain-
ing assets they shall be divided among the common stockholders.

To: Said preferred stock shall receive used be entitled to dividends thereupon at the rate of five percent per annum beginning with the fiscal year in which the stock is respectively
issued and such dividends shall be cumulative. If at any time after the preferred stock has received its cumulative dividends to the extent above provided for, there remains profits
for distribution, the same shall then be applied to the payment of dividends for that year upon the common stock up to five percent, and if after that there still remains profits
for distribution, the same shall then be applied to the payment of dividends for that year upon the common stock up to five percent, and if after that there still remains profits
for distribution, the same shall then be applied to the payment of dividends for that year upon the common stock up to five percent, and if after that there still remains profits
of this Corporation from exercising the several, distribution in the matter of applying profits to dividends, said dividends to be paid to the holders of the preferred stock when dividends
are declared, their right to cumulative dividends to the extent above named, in priority to dividends upon the common stock.

SEAL

Witness the seal of THE EDISON ELECTRIC COMPANY and the signature of its authorized officers
this *28th* day of *May*, A.D. *1925*

Clammann

SECRETARY

William

President

from among its members certain officers, as president, secretary, treasurer, and such others as may be necessary. These officers and directors are directly responsible for the conduct of the business, and are known as the operating body of the corporation. The officials are confronted by certain duties, as the relationship of the corporation to the State, the relationship of the corporation to the stockholders. The scope of activity of the corporation is measured by the general law of the State. Outside of this scope activities are illegal.

286. Meeting Place. This is the place named in the charter as the home of the corporation. It may be in any State, as, a corporation doing business entirely in, say, Minnesota, may be incorporated in New Jersey. The annual meeting must be held in the State where incorporated. The business of electing officers in such cases is largely by proxy. (See page 280.)

Through the comity of States, laws and organizations of other States are recognized throughout the United States, yet corporations of foreign States may be required to be registered and make certain reports in order to do business in some other State.

287. QUESTIONS ON TEXT

Define a corporation. Discuss the duration of corporate life. Give some illustrations of corporate franchises.

Give the different classes of corporations. Define and illustrate a private corporation; a public corporation; a quasi-public. In what two ways may corporations come into existence?

Define a charter, and describe corporate organization thereunder. What can you tell about corporate organization by special statute? State requirements as to corporate name.

Of what does capital stock consist? How is it paid for?

Define subscriber; common stock; preferred stock; watered stock. Discuss the liabilities of stockholders; of the holder of national bank stock. How are shares of stock transferred? How is the business of a corporation conducted? What is a holding company? A trust?

Discuss the rights of stockholders: as to a certificate; to sell his stock; to vote; to inspect books.

What difference is there in a stockholder's liability who is a subscriber and who receives his stock at a discount, and a subsequent holder who bought at a discount after stock had been issued fully paid?

CHAPTER XLVI

POWERS

288. ORDINARY POWERS OF CORPORATIONS

1. To Elect Officers
 - (a) Form of Proxy
2. To Make By-Laws
3. To Sue and be Sued
4. To Make Contracts
5. Scope of Business
6. Dividends

289. DISSOLUTION

290. JOINT-STOCK COMPANIES

291. TABLE OF COMPARISON

292. QUESTIONS ON TEXT

288. ORDINARY POWERS OF CORPORATION

1. *To Elect Officers.* The power to elect officers is vested in the stockholders, who are generally called together by due notice at least once a year. A detailed report of the business is usually submitted for their consideration. At that time all vacancies in the board of directors are filled by ballot, each stockholder being entitled to one vote for each share owned. If several directors are to be elected at the meeting, the stockholder may, if authorized by by-law, multiply the number of shares he holds by the number to be elected and vote the whole number for one director. This is known as cumulative voting. By this method of combining votes in favor of one person, a small minority may succeed in having a representative on the board.

If stockholders do not personally attend the meetings of the corporation, they may, through power of attorney, direct someone to vote in their stead. This is called voting by proxy.

2. *To Make By-Laws.* This legislative right is conferred on the

directors or stockholders by the general law, or is established by implication. The by-laws must not be in conflict with the State laws. They are for the purpose of furnishing the members rules and regulations for the conduct of corporate affairs.

3. *To Sue and be Sued.* All suits at law are brought in the name of the corporation either for or against. Service of process in actions against corporations is made as required by law, but is usually upon certain officers of the corporation. A corporation is liable for injuries inflicted by its agents.

POWER OF ATTORNEY

Know all Men by these Presents,

That I Douglas A. Benson

do hereby constitute and appoint Roland B. Reed

Attorney and Agent for me and in my name, place and stead, to vote as my proxy at any election

of the Consolidated Rubber Company

according to the number of votes I should be entitled to cast if then personally present.

~~In Witness Whereof~~, I have hereunto set my hand and seal this twentieth day
of August one thousand nine hundred and twenty five

Sealed and delivered in the presence of

William J. Kilker

Douglas A. Benson

4. *To Make Contracts.* The old common law recognized the right to contract, but maintained that such contracts must be evidenced by the seal of the corporation. This rule has been changed so that a seal is no longer necessary except upon contracts legally requiring a seal, although formal contracts are usually so witnessed. Contracts *ultra vires* are void. This scope cannot be enlarged by the individual members or officers. It is settled law that, within the scope of the business, all parol undertakings are enforceable against the corporation as well as sealed contracts; and duties imposed by law or benefits conferred, create implied contracts for which an action will lie.

5. *Scope of Business.* Evidently the direct business for which the company was organized. As to collateral activities, it is somewhat of a mooted question. Shall the directors have the power to turn the profits back into business extensions? Evidently yes. This is common practice among corporations and is called "plowing back" the profits. This is a direct benefit to the stockholders. An Illinois court held that "They (bank directors) cannot use any portion of the money for objects of usefulness, or charity, or the like, however worthy of encouragement or aid. They cannot make gifts from the corporate fund."

The Michigan courts in the celebrated Ford Motors Case ruled as follows: "The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employes, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public, and the duties which in law he and his co-directors owe to protesting minority stockholders. A business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."

6. *Dividends.* The board of directors has the power to declare dividends out of the earnings of the company. The dividend must be in proportion to stock or at a certain per cent. As soon as a dividend is declared a stockholder may force its distribution. There are two classes of dividends, cash and stock.

The following is illustrative of the passing of a stock dividend:

BALANCE SHEET

Assets	200,000.00	Common Stock	100,000.00
		Surplus	100,000.00

In the above illustration are listed assets valued at \$200,000.00. The business has accumulated a surplus of \$100,000.00. This sum belongs to the stockholders. The earnings are produced by the assets of \$200,000.00, while the distribution of dividends is based on \$100,000.00. If the directors so decide, this surplus may be transferred to the capital stock and passed to the stockholders as a stock dividend. If paid out in a cash dividend, it would reduce the assets by that amount. A stock dividend of 100% will leave the statement of the business as follows:

BALANCE SHEET

Assets	200,000.00	Common Stock	200,000.00
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The new certificates are made out for the increase, and each stockholder now has twice as many shares as he owned previously, but each share is worth only one-half as much as formerly.

289. Dissolution. There are several ways by which a corporation may be terminated; as by statute (where the right is reserved in the act of incorporation); by surrender, by forfeiture, and by death of all its members in some cases. The statutes of many States provide for its termination or renewal at the expiration of a certain number of years, also that the charter may be changed by statute. The stockholders, through the directors, may wind up the affairs of the corporation and surrender the charter to the power that issued it in the manner prescribed by statute. The charter of a corporation may be forfeited at the instance of the State when such corporation has undertaken the exercise of powers not granted to it, as where it undertakes to create a monopoly, and as in some cases where it has failed to comply with statutory requirements.

290. Joint-Stock Companies. A joint-stock company is an organization that has the appearance of being a corporation, but is in reality a partnership with a large number of members or part-

291. COMPARING PARTNERSHIP AND CORPORATION

PARTNERSHIP

Time	Control	Changing Business	Name	Death of Member Insanity of Member Sale by Member	Voting	Liability	Incomplete Organization
At pleasure of partners.	By members of firm. Each one having a single vote on all questions of policy.	At any time the members see fit.	Any name they desire. May be changed whenever desired. Must not take another firm's name.	Works a dissolution of partnership.	Each member has one vote on every question.	Each member of the firm is individually liable for all of the debts of the firm.	Each member is liable individually.

TABLE OF COMPARISON

CORPORATION

As per statute law or charter.	Organization by stockholders. Business conducted by board of directors.	Only by permission of granting power, <i>i. e.</i> , by the State.	As selected and named in upon charter.	Has no effect upon standing of corporation.	In stockholders' meeting each member has as many votes as he has shares. Each stock director has for but one vote.	No liability beyond paying for stock subscribed for. The holder of National Bank may be individually liable for all the debts of his stock.	The organization may be held to be a partnership, and therefore each member may be individually liable for all the debts of the firm.
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ners. Each partner who invests receives a certificate of stock as a receipt and as evidence of membership.

The organization of the corporation is followed, stockholders' meetings are held, boards of directors elected, and business is transacted the same as in a corporation.

The liability of the stockholders of a joint-stock company is the same as that of members of a partnership.

To recapitulate, the organization borrows from the corporation the following: stockholders' meeting, board of directors that conducts business, and shares of stock to represent capital.

In case of death, insanity, or sale of shares, the transferee takes the place of the transferrer. The stockholders are not agents of the company unless elected to the directorate, but nevertheless remain members of a partnership.

The joint-stock company is not frequently met with in this country.

292. QUESTIONS ON TEXT

Enumerate the ordinary powers of a corporation. How are officers elected? What is cumulative voting? Give an original example. What is voting by proxy?

Who make the by-laws? How are suits brought and defended? How are contracts made and evidenced? What are dividends and by whom are they declared?

Enumerate the different ways in which a corporation may be dissolved. Mention the difference between corporations and partnerships, setting forth the advantages and disadvantages.

CHAPTER XLVII

INVESTMENTS AND SPECULATION

- 293. INTRODUCTION
- 294. OBLIGATIONS
- 295. SAVINGS
 - 1. Investment
 - 2. Speculation
- 296. BASIS OF INVESTMENT
 - 1. Security
 - 2. Convertibility
 - 3. Income
- 297. ANALYSIS
 - 1. Accountancy
 - 2. Legality
- 298. ORDER OF INVESTMENTS
 - 1. Bonds
 - 2. Stocks
 - a. Preferred
 - b. Common
- 299. CAUTION
- 300. WHERE TO BUY
- 301. BUCKET SHOPS
- 302. DISTRIBUTION
- 303. QUESTIONS ON TEXT

293. Introduction. The growth of corporate finance has become so broad and extensive in order to meet the growing demands for increased capital that a knowledge of financial questions relating to the furnishing of this money is imperative on the part of the individual. The enterprises of today are becoming so large, and

their demands so great, that the individual can hope to furnish only a small part of the aggregate capital necessary. Many of our large corporations number hundreds of thousands of stockholders, all part owners in the enterprise. The United States Steel has 150,000 stockholders, while the American Telephone and Telegraph has 340,000 stockholders. Two vital questions for the investor are these: Is the company reliable? Can it do what it promises? Through savings and careful investment the laborer, be the labor mental or manual, is also a capitalist, and his capital makes it easier to earn and to save more for future enjoyment.

294. Obligations. The corporation of today offers two general lines of obligations whereby the investor can assist in the financing of the enterprise and hope to get a reasonable income from his sacrifice in saving small amounts.

These obligations are two kinds of stocks and many kinds of bonds. To a small extent, a stockholder is a part owner of an indivisible part of a concern and he expects a return for his investment in the shape of a dividend; while a bondholder has a claim for a certain amount due him at a certain future date that bears a regular rate of income called interest, payable generally semi-annually. Dividends are paid out of profits, but interest may have to be paid out of capital.

295. Savings. The savings of the past constitute the capital of today. The savings of today make up the increased capital of tomorrow, making it possible to develop new industries and enlarge old ones. All savings come from some form of labor, and is the part not expended for necessities and luxuries today. The hope of greater enjoyment in the morrow causes far-seeing people to save.

1. *Investment.* This is the purchasing of property, such as stocks, bonds or real estate, in order to secure an income from dividends from stocks, interest on bonds and rental from real estate. "Investing means placing one's capital in an enterprise which has a history of constant income-bearing power."

2. *Speculation.* This is the purchase of property such as stocks, bonds or real estate with the expectation of making a sale at an

increased price, or selling short, which is a sale at a fixed price today with the expectation of buying in the future at a lower price and making a delivery at this lower price, thereby making a profit. All stocks have more or less of a speculative character. This is evidenced by a higher rate of income than bonds. Investment looks to productive use—Speculation to fluctuation of market price.

296. Basis of Investment. The basis of correct investment is as follows: (1) Security; (2) Convertibility; and (3) Income. First, that your security may be ample and of no uncertainty; second, that in case of need the security may be converted into money on a ready and sure market; and third, that the income is sure and certain. To be assured of an income, returns must be within reason. Some one has said, "It is better to loan money on a promise of 6% and get it, than it is to loan on a promise of 20% and not get it."

George M. Forman & Co., a prominent real property bond house of Chicago, lays down the following eight tests to an investment; viz., (1) Is your investment protected by property of permanent value? (2) Does your claim command payment before other obligations? (3) Has the property a sufficient earning power? (4) Is the property adequately protected by insurance? (5) Is it properly managed? (6) Is the title clear? (7) What is the moral character of the borrower? (8) Who offers the securities you buy?

297. Analysis. No person can hope to make good investments on his own initiative unless he is enough of an accountant to analyze a balance sheet and determine from it the book value of the various kinds of securities the corporation is issuing and knows enough law to determine the legal priority of these several issues; viz., stocks and bonds.

298. Order of Investments. Based on security, and that is the only basis an investor can figure, investments are about as follows:

1. Bonds issued by the United States government, followed by

State and municipal bonds. These bonds bear at present from 4% to 5½% interest.

Bonds of corporations, well secured, bear from 5% to 5½%. Occasionally a short bond from a strong corporation bears as high as 6% or 6½%.

Foreign bonds of stable governments rate from 5% to 8%.

2. Stocks. If the investor is willing to assume a somewhat higher risk to secure a higher rate of income, there are a large number of stocks to choose from, (a) preferred that bear from 6% to 7%, and occasionally added dividends may be received; (b) common stocks of solid, substantial companies range from 5% to 12%. But dividends depend upon the general prosperity of the country, and in case of a business depression the dividend may be passed; that is, not paid. Again, stocks paying 12%, and a few bank stocks as high as 20%, cannot be purchased at par, but at such a premium as will reduce your earnings to a rate somewhat higher than the current rate of interest. National bank stock and most State bank stock carry a double liability, and in case of failure the holder of bank stock faces the possibility of a 100% assessment of the par value of his holdings. This liability does not attach to ordinary preferred and common stock. It is issued "non-assessable." The investor is cautioned that if first issue stock is not paid in full, he is liable for the balance in some States.

299. Caution. Do not buy stocks of new companies by getting in on the "ground floor" and expect to realize high returns. Although many companies have done so, where one company makes a wonderful success, scores of companies make mediocre success or dismal failures. The risk of financing new companies should be left for the financier whose able judgment enables him to reduce the loss to a minimum.

300. Where to Buy. This is a somewhat delicate question, but until the investor becomes thoroughly experienced, he should consult his banker and buy from him for his start, notwithstanding there are a large number of thoroughly reliable bond and stock houses that make a business of furnishing good securities. If

your banker carries bonds for his bank's investment and sells to the investor from his holdings, he is giving all the assurance of good bonds that one can expect.

301. Bucket Shops. These are institutions purporting to be bond and stock houses doing a legitimate business in furnishing opportunities for investment to the public. As a matter of fact, they do not buy or sell at all, but merely gamble on price fluctuations of the securities dealt in. Each year millions of dollars are swallowed up by fraudulent companies. In 1923 it reached the amount of one billion dollars that found its way to the pockets of fraudulent salesmen. Many of the States are enacting drastic laws to prevent such sales, but the "suckers" come and go and a rich harvest is reaped. Laws have yet to be enacted that will keep money in a "fool's" pocket.

302. Distribution. The average investor does not have much to say about the management of the concern in which he invests. It is therefore an important question to him as to whether his investments shall all be in one organization or distributed over several. The weight of opinion among financial experts is that an investment, say, of ten thousand dollars, is safer in ten different corporations of one thousand each than the whole amount in any one of the ten named, the corporations all being of the same rating. This does not apply so forcibly to government and municipal bonds. Andrew Carnegie said, "If you put all your eggs in one basket, then watch the basket."

303. QUESTIONS ON TEXT

1. Distinguish between an investment and a speculation.
2. What are savings? What is capital?
3. What is a stock certificate? What is a bond?
4. In case of a failure, which is paid first, the stockholders or the bondholders?
5. Why do government (U. S.) bonds bear a lower rate than municipal bonds or industrial bonds?
6. Why distribute your investment over a series of good investments rather than all in one good investment?

CHAPTER XLVIII

MISCELLANEOUS TOPICS

304. APPLICATION OF COURT DECISIONS TO FACTS

305. HYPOTHETICAL PROBLEMS

306. MOOT COURT CASE

307. SEARCH QUESTIONS (STATE LAWS)

304. APPLICATION OF COURT DECISIONS TO FACTS

1. Creation. Facts: Several men attempt, in good faith, to organize the A corporation according to the requirements of the law of the State of B; but they do not comply strictly with those requirements. Then they begin to carry on business as a corporation. They sue C, a subscriber for stock, for the amount of his subscription.

Ruling Cases: *North Church v. Pickett*, 19 N. Y. 482; *R. R. Co. v. Cary* 26 N. Y. 75; *Ind. Co. v. Herkimer*, 46 Ind. 142; *Soc. Perun v. Cleveland*, 43 Ohio St. 481; and *S. v. P. etc.*, 10 R. I. 112.

- (a) Can C set up, as a defense, the defects in the A corporation?
- (b) If, however, the A corporation is not only defectively organized, but is also illegal because its dealings are contrary to public policy would the contract of C be enforceable?
- (c) If, however, C signs articles agreeing to the organization of the A corporation, "as therein stated," but the corporation is not organized "as therein stated," is he (C) bound to pay for the subscription of the stock?
- (d) If D borrows \$100.00 from the de facto A corporation and gives his note, can he when sued upon the note set up the defective organization of the corporation?

2. Rights of Stockholders. Power of the Majority. Facts: The stockholders of the A corporation at a regular meeting passed a motion to change the business policy of the cor-

poration. This change in policy seemed unwise and dangerous to the minority stockholders.

Ruling Cases: *Elkins v. R. R. Co.*, 36 N. J. Eq. 241; *Union Locks v. Towne*, 1 N. H. 44; and *Hartford, etc., v. Crosswell*, 5 Hill 383.

- (a) If the proposed change in the business policy of the corporation is not outside the authority of the charter, what, if anything, can the dissenting minority stockholders do to prevent it?
- (b) If, however, the majority stockholders in accordance with a vote passed at a regular meeting propose to go outside the original objects of the corporation, and undertake measures not included in its charter, what, if anything, can the dissenting minority stockholders do to prevent it?
- (c) If a majority of the stockholders vote for mere changes in the method of operation, are such changes permissible, or may dissenting minority stockholders prevent them?

3. Right of Stockholders to sue on behalf of the corporation.

Facts: The directors of the B corporation sold their own land to the corporation at a price much above its fair value. C, a dissatisfied stockholder, brought a bill in equity against the directors, asking relief. The directors admit that the price of the land was in excess of its value.

Ruling Cases: *Brewer v. Proprietors*, 104 Mass. 378; *Foss v. Harbottle*, 2 Hare, 461; *Hawes v. Oakland*, 104 U. S. 450; and *Tuscaloosa v. Cox*, 68 Ala. 71.

- (a) Can C succeed in obtaining the relief asked?
- (b) In the above problem, if the act complained of is one that the corporation by a majority vote can legally adopt and confirm, and the corporation actually does adopt and confirm it, will a court of equity set it aside upon the complaint of C, a dissatisfied stockholder?
- (c) In the above problem, if C, the dissatisfied stockholder, before bringing his bill in equity, had made no effort to induce the corporation to remove delinquent directors and elect others, who would protect the corporate interests, can he succeed in obtaining the relief asked?
- (d) In the above problem, if directors, who sold their own land at an excessive price to the B corporation and thus defrauded it, own a majority of the stock, or are in collusion with those who own controlling interest, what effect, if any, does this fact have on C's bill for relief?

305. HYPOTHETICAL PROBLEMS

1. There is a firm incorporated under the name of The Libertyville Creamery Association. Another wishes to incorporate under

the name of The Libertyville Butter and Cheese Association. Discuss the probability of the State issuing a charter to the new company.

2. An association of several corporations is formed for the purpose of dividing up the territory and fixing prices. Discuss the standing of this agreement.

3. A corporation whose stock is part common and part preferred finds that it has made a large profit. It pays the regular preferred dividend, but does not declare a dividend on the common stock although it has a large surplus. Discuss rights of the common stockholders.

4. In the settlement and winding up of the affairs of a corporation, discuss the order of paying the following liabilities: common stock, bonds, bills payable, preferred stock, personal accounts payable, taxes due the government. The capital stock of the company is \$100,000, one-half in each kind of stock named. There is a shortage of \$15,000 in paying the several claims.

5. Five parties subscribe for the stock with the intention of forming a corporation for the manufacture of household furniture. The company is formed and started, but at the end of the year the assets are exhausted and the company closes its doors. There are debts due creditors aggregating \$10,000. It develops that while all the steps of incorporation were taken, the articles of incorporation were never issued. Discuss rights of stockholders and creditors.

6. In a certain corporation cumulative voting is allowed. There are 2,000 shares of \$100 each. The stock is held by two groups, one owning 71% of the issue and the other 29%. There are nine directors to be elected. The minority desire to nominate and elect as many directors as possible. How many shall they nominate?

7. Again, as above, but the stock is held by 55 per cent and 45 per cent divisions, and the majority nominate and attempt to elect six members. Under these conditions how many may the minority nominate and elect?

8. A stockholder in a corporation is dissatisfied with the financial reports sent out to the stockholders and statements made to the general public. He demands the right to examine the

books and to make use of a public accountant in so doing. Discuss the rights of the corporation and the stockholders in this case.

9. Two firms are A B C & Co., incorporated, and A B C & Co., not incorporated. They each fail in business with liabilities of \$150,000 and assets of \$50,000. In each firm B is a millionaire, while the other members of each firm have all their property invested in the business. State what the creditors may expect in each case.

306. MOOT COURT CASE

Action. This is an action for dissolution. *Facts.* A corporation is being formed by several interested parties. In order to secure subscriptions they sign for more stock than they intend to pay for and also add the names of two well known financiers for a block of stock. Finally the stock is oversubscribed and the organizers withdraw the names and subscriptions of the two financiers and reduce their subscriptions. The incorporation is completed and the business is started. Two of the stockholders learn of the deception played on them and they start proceedings to dissolve the corporation and to have the funds distributed according to the holdings. The assets are equal to the liabilities and no charge can be made of inflation, nor did the organizers charge anything for organization purposes. The company has splendid prospects for profits.

Issue. The case has been tried in the Circuit Court and the petition denied. The case is being tried now before the Appellate Court.

307. SEARCH QUESTIONS (STATE LAWS)

To what State officer should application be made for incorporation papers? How are corporations classified? By whom are the by-laws made? By whom are the directors elected? How many incorporators are required?

What is the maximum and minimum number of directors allowed in your State. For how long may a company be incorporated?

What are the statutory requirements in regard to recording papers in the county where the principal office is located? What are the requirements in regard to a principal office? What are the requirements in regard to stock subscriptions? What proportion must be subscribed before incorporation can be completed?

What different kinds of stock are authorized? Is treasury stock permitted?

If so, how is it held? What are the provisions as to stockholders' liability? Must stock be fully paid for when issued? Are there blue sky laws? Have these laws been vigorously enforced? Would it be better handled by a national law? Why?

What is the effect when a corporation fails to comply with all the organization requirements? What is the standing of an oral contract for the sale of stocks or bonds? May a corporation like a mine or a railroad company own and operate a store? Are special charters granted by the State legislature? May a corporation owning stock in another corporation, of the same State, vote the stock? Does the State tax the capital stock of the company, or only its assets?

What showing is required to prove non-participation in a monopoly or trust? What things are necessary to procure a receivership?

How are the affairs of a corporation whose charter has expired by lapse of time closed out? Mention some statutory grounds for forfeiture of charter at the suit of the State. What formalities are required of a foreign corporation before it can transact business in your State?



WILLIAM HOWARD TAFT—TWENTY-SEVENTH PRESIDENT

Born in Cincinnati, Ohio, on September 15, 1857. Graduated from Yale 1878; second in class of 121; graduate of Cincinnati Law School 1880; divided prize for scholarship with another. 1881-1882, assistant prosecutor of Hamilton County, Ohio. 1887-1890, judge of Ohio Superior Court; re-elected. 1890, appointed U. S. Solicitor-General by President Harrison. 1892-1896, U. S. Circuit Court judge (Sixth circuit). 1896-1900, dean and professor of law at University of Cincinnati. 1904, Secretary of War in Roosevelt's Cabinet. 1908, elected President. 1913, Kent professor of law at Yale University and president of American Bar Association. 1914, first president of American Academy of Jurisprudence Association. 1921, nominated Chief Justice of U. S. Supreme Court by Harding. Only man in the United States history who ever held both the office of President of the United States and Chief Justice of Supreme Court.

CHAPTER XLIX

INSURANCE

308. INTRODUCTION

309. NECESSITY

310. KINDS OF INSURANCE

311. FIRE INSURANCE

1. Parties
2. What and When to Insure
3. How to Insure
4. Terms

312. LIFE INSURANCE

1. Introduction
2. Classes of Policies

313. MARINE INSURANCE

1. Introduction
2. Characteristics

314. QUESTIONS ON TEXT

308. Introduction. Insurance is a highly specialized business and is very strictly regulated by statutory enactments. Every State has a bureau or commissioner of insurance. The laws are very complex and exacting. The business man is more interested in "How to Insure," "What to Insure," and "When to Insure," than in the law which in particular is the province of the specialized broker and attorney. Be sure that you are doing business with a reputable firm that will protect you in regard to legal difficulties.

309. Necessity. Adam Smith, the economist, says, "The trade of insurance gives greater security to the fortunes of private people, and by dividing among a great many that loss which would ruin an individual makes it fall lightly and easily upon the

whole society." The Egyptians recognized the principles of insurance when Joseph said "Let us take one-fifth of the corn crop of the seven prosperous years before us and keep it as a provision for the seven years following, in which the corn crop will be small."

310. Kinds of Insurance. There are three main classes; viz., fire, life and marine as well as many special classes as, accident, health, casualty, and others such as automobile, theft, plate glass, use and occupancy, salesman's supplies, burglary, paymasters' and workmen's compensation insurance.

311. Fire Insurance. 1. *Parties.* Insurance agreements are contracts. The parties are insurer and insured, the policy is the contract, the premium paid the consideration.

2. *What and when to Insure.* It is a business necessity for a man of affairs to carry insurance to cover the risks of business activities:

(a) If he has personal property, it should be insured.

(b) If he has buildings, they should be insured.

(c) If he enters into a special business deal requiring risk of property losses, he should carry insurance.

(d) If his death would leave any of his dependents without proper care, he should be insured.

(e) If his death would endanger his partnership business, he should be insured in the interest of the business.

(f) If accident or health would deprive himself or dependents of maintenance, he should be insured.

(g) If he possesses valuables, such as pictures, plate, curios, jewelry, he should carry special insurance.

(h) If he uses dangerous machinery in his business where employees and others may be injured, he should carry insurance against personal damages.

(i) If his insured property increases in value, have the added valuation covered in your insurance.

(j) If his insured property has permanently declined in value, have the policy decreased and ask for a refund on premium paid.

(k) If workmen's compensation is required in the State, see that its provisions are complied with.

3. *How to Insure.* The first step is to make out an application which requires the answering of many questions. These constitute representations, conditions and warranties and may seriously affect the standing of your policy if not answered truthfully.

4. *Terms.* Any interest in property may be insured. A risk may be covered by several policies with different companies. Mutual companies generally limit the amount of insurance to, say, three-fourths of the value of the property, while stock companies will insure to full value and generally require over 80% insurance or they make the insurer a co-insurer with the company. When a loss occurs the policy directs that a notice shall be given within a certain time which is interpreted to be a reasonable time. In a New York case, a delay of forty-eight hours was declared fatal, and in an Illinois case the loss was not reported for five weeks after the fire, yet this was held to be a reasonable time. Fire insurance policies may be assigned. The policy covers losses arising from your own carelessness, but not intentional losses. Read your policy and comply with its terms.

312. Life Insurance. 1. *Introduction.* The business of life insurance is generally carried on by regularly organized associations that make this their sole business. The companies are very similar to fire insurance companies, and the terms and conditions of issuing policies are governed by the same general principles.

2. *Classes of Policies.* There are three general classes of policies; viz., ordinary life plan, limited payment life plan, and endowment plan. In the first the premiums are payable for life and the policy is payable at the death of the insured; in the second the payment of premium is limited as for twenty years, while the policy calls for payment at death as in the first plan; in the third the premiums are paid within a certain period and the policy calls for payment at the end of a period as for twenty years. This latter plan, therefore, carries an investment feature. Joint policies are issued as to husband and wife. Annuity policies may be procured securing a monthly payment for the balance of the

life to begin at the age of say sixty-four years. There is no limit in the amount of life insurance one may carry.

Life insurance policies may be assigned and are frequently used as a basis of a loan. Most policies have a cash surrender value in case the policy is terminated. (See Case Nos. 60 a-b).

313. Marine Insurance. 1. *Introduction.* The business of marine insurance is much the same as that of fire insurance. It is carried on largely by incorporated companies. The subject of marine insurance is very extensive and abounds in technicalities. A careful study of the subject must be made to become thoroughly conversant with it.

2. *Characteristics.* The policy issued may be open, that is, the amount is subject to reports, or closed, that is, the amount is designated. The policy may be secured after shipment and contain a clause "lost or not lost." Frequently the policy reads "for the benefit of all whom it may concern at the time of the loss." Such a policy usually accompanies documentary bills.

The amount of insurance agreed upon may cover the value of the goods, the freight charges and the profits of the venture.

The contract of marine insurance covers all losses, as fire, perils of the sea, piracy, capture and extraordinary losses. The latter includes general average, which is an assessment made where it becomes necessary to throw overboard a part of a cargo to save the rest, the sacrifice being successful.

314. QUESTIONS ON TEXT

Mention the most important kinds of insurance. What does Adam Smith say of the business of insurance? What are representations, conditions, warranties? Are insurance policies assignable? Does a policy cover your own carelessness that results in a loss? How are life insurance policies classed? What is marine insurance?

CHAPTER L

MISCELLANEOUS TOPICS

315. APPLICATION OF COURT DECISIONS TO FACTS

316. HYPOTHETICAL PROBLEMS

317. SEARCH QUESTIONS (STATE LAWS)

[315. APPLICATION OF COURT DECISIONS TO FACTS

1. Warranty, Representation, and Concealment. Facts: A applies in writing to the B Insurance Company for a policy of insurance on his building. He represents that it is used as a hardware store, which is true at the time the application is made.

Ruling Cases: *Ins. Co. v. Ewing*, 92 U. S. 377; *Blood v. Howard Ins. Co.*, 12 Cush. 472; *Ins. Co. v. Mowry*, 96 U. S. 344; *Evans v. Ins. Co.*, 64 N. Y. 304; *Boggs v. Am. Ins. Co.*, 30 Mo. 63.

- (a) Suppose this representation had been inserted or referred to in and made a part of the policy and it was not subsequently adhered to during the term for which the policy runs, would the policy be void? Why?
- (b) Suppose that before the policy is issued he stores gasoline in the building, but is asked no further question as to the use of it, is the policy which is afterwards issued binding? Why?
- (c) Suppose that A had not stored gasoline in the building until sometime after the policy was issued and that there was no actual stipulation in it that the building will continue to be used for a hardware store, is the policy that was issued before the storing of gasoline binding? Why?
- (d) Suppose at the time A made a written application for a policy on his store he made some false oral representations which were not made a part of the written application, can he recover if the building burns after the policy is issued? Why?
- (e) In the above problem, suppose that A's policy provides for the payment of premiums in installments and that the policy is to be void

if the installment premiums are not paid when due, and that A, on account of serious illness, fails to pay a certain installment on the day it is due, and that the building burned the next day, can he recover for the loss? Why?

- (f) Suppose in the above problem that the B insurance company is enjoined from doing business pending an examination of its condition, is A excused for non-payment during that period of time?
- (g) Suppose in the above problem A intentionally withholds facts from the B Insurance Company, material to the risk, will such concealment void the policy?

316. HYPOTHETICAL PROBLEMS

1. A owns property. He mortgages it to B, who assigns it to C. A, B, and C each successively apply for and receive insurance on the property. Discuss standing of these policies.

2. A's household goods are on the first floor, and are badly damaged by water used in putting out a fire on the top floor. The goods were insured. Can he collect for the loss?

3. Same as in 2, but the insurance patrol remove the goods to the street, where they are damaged by a rain immediately following. Does the insurance cover the loss? What if some of the goods were stolen while in the street?

4. Insurance to the amount of \$5,000 is issued to B, a statement being included in the application that there is no building within 100 feet. After the policy is issued, a building is erected on an adjoining lot within 50 feet. Does this affect the standing of the policy?

5. The board of underwriters provides in a certain town that unless 80% of the value of the building is covered by the policy of insurance the amount paid on a loss shall be but a proportional amount of the loss.

The following losses are reported:

Valuation \$90,000, insurance \$75,000, loss \$10,000.

Valuation \$80,000, insurance \$30,000, loss \$2,000.

In each case, how much will be paid by the company?

6. A has a building valued at \$25,000, 80% clause applying, insured in three companies as follows: In A \$8,000; in B \$7,000; and in C \$5,000. The building is damaged to the extent of \$10,000. How much is to be collected from each company?

317. SEARCH QUESTIONS (STATE LAWS)

Who may conduct an insurance business? What limitations are placed upon a company buying and selling goods? What restrictions are placed upon foreign companies doing business in another State?

How must insurance business be placed? What are the regulations in regard to the investment of capital? What real estate may a company hold? What is the nature of the required annual report, and to whom must it be made? What is done with the annual report? What officer has oversight of companies? What limitation is placed upon reinsurance?

Under what conditions may a charter, or license, be revoked?

Is there any authority to form mutual companies? What are the restrictions? How is the amount of premium determined?

What are the regulating conditions and provisions concerning life insurance companies?

Give a form of statement for accident companies.

What provisions are made for insurance in case of accidents to employes?

CHAPTER LI

REAL PROPERTY

318. DEFINITION

319. AN ESTATE

320. FREEHOLDS

1. Inheritance
2. Non-Inheritance
 - (a) Dower
 - (b) Homestead

321. NUMBER OF OWNERS

1. Estates in Severalty
2. Joint Estates
 - (a) Joint Tenancies
 - (b) Tenancies in Common
 - (c) Partnership Estates

322. PARTITION

323. TIME OF ENJOYMENT

324. QUESTIONS ON TEXT

318. Definition. Property in general is divided into two kinds, personal property and real property. Real property is such as has permanency of location, and includes lands and, with a few exceptions which will be indicated later, rights and interests in lands.

319. An Estate. The words "estate" and "interest" are practically synonymous. An estate is such an interest in land that public policy demands its recognition as a right. The majority of estates in real property are of feudal origin and a number of these have become obsolete, consequently these latter will not be considered here. Others are going out of use, for instance, "Curtesy," and will soon become merely history.

320. Freeholds. Freeholds are estates in which the holder owns the land, as opposed to leaseholds, in which the holder has the right of enjoyment only. They are divided into estates of inheritance and those not of inheritance.

1. *Inheritance.* An estate of inheritance is one which, upon the death of the owner, either passes by descent to his heirs, or, under the provisions of his will, to his devisees. The most important of these is the fee simple absolute, the highest estate known to law. This is an inheritable freehold, free from condition and of indefinite duration. Other estates of inheritance are determinable fees which may terminate upon the happening or not happening of some event.

2. *Non-Inheritance.* Estates of non-inheritance comprise all freeholds known as life estates. These may be created by agreement or by law, common or statutory. Of the former the most common are those created by deed for the life of the grantor, or for the life of the grantee. Of the legal life estates the principal ones are dower, curtesy, and homestead.

(a) *Dower.* This is the estate which the law provides for the widow out of the real property of the deceased husband. During his life the right is inchoate, and, if the wife does not survive the husband, never materializes, but in the event of her survival, upon his death, she becomes entitled to a life estate in one-third of all the inheritable real property which he possessed during the marriage and in which she has not released her dower right. While he is alive she can convey this dower right only by joining in a deed with him, or releasing to his grantee. By statute some States have changed this estate from a life estate to an absolute fee simple in the one-third of the deceased's real property. A similar estate by statutory enactment is granted the husband.

(b) *The Homestead.* This is a statutory life estate granted to the surviving spouse, or to the children during minority, in the deceased's real property to the value of a fixed amount varying from \$1,000 to \$2,000 or thereabouts. The estate is exempt from levy and sale under execution for debt, is based upon public policy, and can be extinguished by conveyance or abandonment.

321. Number of Owners. As to number of owners, estates are classified as estates in severalty and joint estates.

1. *Estates in Severalty*. An estate in severalty is one of which there is but a single owner who holds and enjoys it to the exclusion of all the world. (See Case No. 61.)

2. *Joint Estates*. A joint estate is one owned by two or more persons. The most common joint estates are joint tenancies, tenancies in common, and partnership estates.

(a) *Joint Tenancies*. A joint tenancy is a joint estate in which all of the co-tenants have one and the same interest, acquired at one and the same time, by one and the same instrument, held by one and the same possession. During their lives they equally enjoy the land or its equivalent in rents and profits. Upon the death of one his share reverts to the survivor or survivors, and so on until there is but one tenant who then holds the estate in severalty. This doctrine of survivorship is the distinguishing feature of the joint tenancy. A joint tenancy cannot be acquired by descent, but must be created by purchase, and may be in fee, for life or for years. Neither is a joint tenant's interest descendable or devisable, but he may alienate his share to a stranger who will hold as a tenant in common with the other joint tenants that continue to hold in joint tenancy.

(b) *Tenancies in Common*. Tenancies in common are joint estates in which there is unity of possession only, the titles may be separate and distinct and the interests different. If the estate is in fee, a tenant may dispose of his interest by will, or it will pass by inheritance to his heirs.

(c) *Partnership Estates*. An estate in partnership is a joint estate vested in the members of a partnership, purchased with partnership funds for partnership purposes. In equity the estate is treated as personal property liable for the partnership debts, but after payment of these debts, the remainder of the realty, or the proceeds of its sale, is treated as real property passing to the heir or devisee, and subject to dower.

322. Partition. Partition is the act of dividing joint estates into estates in severalty among the co-tenants in proportion to their undivided shares in the joint estate. All joint estates are subject to partition. The partition is voluntary when all the co-tenants join in mutual deeds conveying a separate parcel to

each co-tenant in severalty. If all do not join the partition is void. Partition is compulsory or involuntary when compelled or enforced by suit at law or in equity by one or more of the co-tenants.

323. Time of Enjoyment. As to time of enjoyment, estates are either present or future, or, as they are sometimes called, estates in possession and estates in expectancy. A present estate, or an estate in possession, is any estate in lands, to the possession of which the true owner is immediately entitled. Future estates, or estates in expectancy, are such estates the possession and enjoyment of which is withheld or postponed until some future time. The most common of these are reversions and remainders. A reversion is that future interest in lands which a grantor has after conveying a present estate to another person which does not include all the grantor's estate; as, for example, Smith, owning a fee, conveys a life estate to Brown. The part of the fee left to Smith is a reversion. A remainder is a future estate in lands, which is preceded and supported by a particular estate in possession; and it takes effect in possession immediately upon the termination of the prior particular estate; it is created at the same time and by the same instrument as the particular estate. By particular estate is meant a part or portion of the entire fee or interest; as, for example, a life estate is a particular estate. If Smith conveyed land to Brown for life, and upon Brown's death to Jones, Jones' estate is a remainder, and Brown's estate, the particular estate supporting it. Remainders are said to be contingent when the taking by the remainderman is uncertain, vested when the title has passed to the remainderman.

324. QUESTIONS ON TEXT

Define estate. Define and classify freeholds. What is an estate of inheritance? Name and define them. Define dower. What is homestead and what is its purpose? What is an estate in severalty? A joint tenancy? A tenancy in common? Distinguish between remainder and reversion. Give illustrations if possible. What is a particular estate?

CHAPTER LII

LANDLORD AND TENANT

325. LEASEHOLDS

1. Estate for Years
2. Tenancy at Will
3. Tenancy from Year to Year
4. Tenancy by Sufferance

326. ASSIGNMENT OF LEASE

327. COVENANTS

328. EMBLEMENTS

329. FIXTURES

330. MINOR PROVISIONS

331. QUESTIONS ON TEXT

325. Leaseholds. These are estates in real property which are less than freeholds and are regarded as personal property. Leaseholds comprise estates or tenancies for years, tenancies at will, tenancies from year to year, and tenancies by sufferance.

1. *Estate for years.* An estate for years is an estate limited for a certain definite time. It may be created orally unless its terms require an instrument in writing in compliance with the Statute of Frauds. It does not become an estate until entry by the lessee; then from the lease and the entry the relation of landlord and tenant arises.

2. *Tenancy at Will.* A tenancy at will is one which may be terminated at the will of either party. It is created by an agreement, express or implied, for an uncertain time, without any fixed rent. The tenant cannot assign his interest and the tenancy is terminated by the death of either party, or by a conveyance by either of his interest.

3. *Tenancy from Year to Year.* This tenancy is for one year

certain, and for successive years, unless due notice be given to terminate it. Notice required to terminate the tenancy is generally regulated by statute. Tenancies for less periods than a year, created in the same manner, are similar in character.

4. *Tenancy by Sufferance.* This arises when one who has entered under a lawful lease continues in possession after his interest ceases, without the landlord's consent. It may be terminated by the landlord in two ways, first, by recognition of the tenant, in which case a tenancy at will, from year to year, or for years arises, and, second, by entry by the landlord, in which case the tenant is treated as a trespasser.

326. Assignment of Lease. An estate for years may be conveyed or assigned by the lessee unless restricted by contract or statutory enactment. The lease may contain a covenant against assignment. The reversion may also be conveyed by the lessor and the grantee acquires all the rights and liabilities of the original lessor. Unless forbidden by the lease, the lessee may sublet a part or the whole of the premises for a shorter term than the lease. The sub-lessee however is liable for rent to the original lessee, his lessor, only, and not to the original lessor.

327. Covenants. These are agreements, express or implied, fixing the rights and liabilities of the respective parties. Among these is the covenant by the lessee to pay rent. On the part of the lessor a covenant for the quiet enjoyment of the premises is said to be implied from the relation of landlord and tenant. The lessor also impliedly covenants for the payment of taxes. Other covenants are those of repair, insurance, and renewal of the lease.

328. Emblements. These are the products of the soil which result from the annual labor and cultivation by the person in possession of the land. They are generally regarded as chattels, and include the grains, garden produce, and other annual crops. Emblements are to be distinguished from "fructus naturales," such as trees, grasses, and perennial bushes, which are regarded as part of the land and are therefore realty. The right of the tenant

to emblements, which includes the right to enter after the termination of the tenancy to cultivate and harvest crops planted prior to such termination, depends upon the certainty or uncertainty of his interest. A general rule is that if his interest is uncertain and is terminated without fault on his part, the outgoing tenant is entitled to emblements. Thus, tenants at will and from year to year, when the tenancy is terminated by the landlord, are so entitled. Also, the personal representatives of life tenants are entitled to emblements; but, generally, a tenant for years may not have emblements, since his interest is certain and he can foresee whether the crop will mature during his term; tenants at sufferance may not have them, since their holding is wrongful, nor can tenants whose tenancies are terminated by their own default.

329. Fixtures. These are things personal in their nature which may become real property by becoming annexed or attached to real property. The annexation may be (1) actual, as in the case of buildings or fences with posts in the soil, or it may be (2) constructive, as in the case of keys, storm windows, and movable screen doors. If the annexation is made in a permanent manner and by the owner of the property with the intention that it shall remain, the property becomes a fixture and part of the realty. If the annexation is of a temporary character and is made by one who has only a temporary interest in the realty, as for instance by a lessee, the presumption is that it was intended to be removed at the termination of such interest, and the property does not become a fixture, but remains personalty. In general a tenant is allowed to remove all property annexed by him for trade, domestic, or ornamental purposes provided they can be removed without permanent injury to the realty. Under this rule stoves, looking glasses, and anything attached by screws can be removed.

Where the right of removal is in doubt, it is to be determined from the intention of the person annexing the chattel. Such intention is inferred from the nature of the article, the relation of the annexing party to the land, and the manner and purpose of the annexation. The proper time of removal is during the term, or before possession is surrendered, but when the term is indefinite

and is terminated without the tenant's fault, he has a reasonable time after termination in which to remove the chattels.

330. Minor Provisions. The formation of the contract known as a lease and creating the relationship of landlord and tenant frequently, in fact, generally, has other items for consideration than the making out of a lease giving the necessary terms. There are at times many minor provisions that affect the occupancy and the use of the property that are discussed at the time of making the lease but are not reduced to writing. This procedure is a cause of frequent dispute and wrangling between landlord and tenant. Both parties may be sincere in their belief that each is right in his opinion of these minor details, as for example, an apartment in a city property is leased. The landlord agrees to decorate the apartment. Now decorating may include a number of small items that are particularly desired by the tenant, such as the tint of the walls in the living room, the enameling of the walls in the bath room, the color of the paper in the bedrooms, the varnishing of the woodwork, putting on of a new lock and furnishing, say, three keys to the entrance door, and several other items. The landlord agrees, the lease is signed, the decorator arrives and completes the work as he was instructed by the landlord. Small items are not as desired or as the tenant understands. Dissatisfaction is the result. If, when these items were talked over, a memorandum had been made and O.K.'d by the landlord all would have been satisfactory. Such items are not often entered in the lease. It is too much "lumber." They may be referred to in the lease as "See Memo.," but this is not the general custom. A memorandum properly made out and agreed to will settle all disputes. If there is liable to be a dispute in regard to fixtures, name them in the memorandum, as the tenant may desire to change some of the electric light fixtures and take them away at the end of the leasehold. If it is farm land that is being leased, there are several questions that had better be put in a memorandum, such as use of firewood, repairing fences, keeping out certain noxious weeds, furnishing material as for repair of fences. For some of these the landlord is to allow on the rent. All of

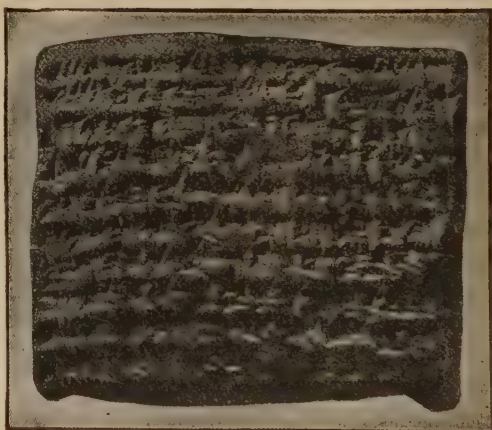
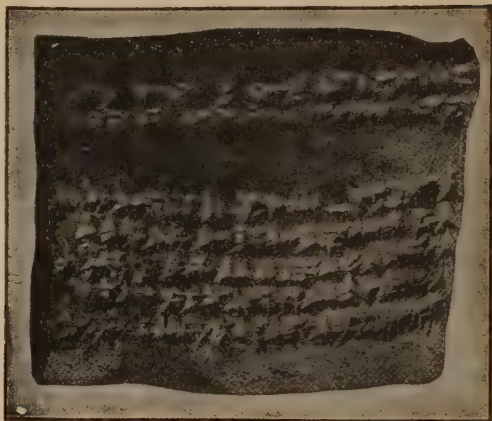
these provisions should be noted and a memorandum signed at the time.

331. QUESTIONS ON TEXT

Classify leaseholds. Define the various leasehold estates. What is a tenancy at will? A tenancy from year to year? Define tenancy by sufferance, and discuss the landlord's rights. What crops are emblements and what are not? Discuss the tenant's rights to emblements. How may a chattel become a fixture?

AN ANCIENT MORTGAGE AND TRUST DEED

The brick tablet pictured here was found some years ago in excavating the ancient Babylonian town of Nippur. This tablet among other cuneiforms was taken from the ruins of a banking house which evidently handled mortgages and loans of all kinds. The instrument is a first mortgage as well as a trust deed and note combined, and though executed in the fourth century before the Christian era (King Artaxerxes reigned 464-424 B.C.), exhibits many of the features of our modern documents.



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TRANSLATION

"Thirty bushels of dates are due to Bel Nadin Shun, son of Marashu, by Bel Bullitsu and Sha Nabu Shu, sons of Kirebti, and their tenants. In the month of Tisri (month of harvest), of the 34th year of King Artaxerxes I, they shall pay the dates, thirty bushels, according to the measure of Bel Nadin Shun, in the town of Bit Balatsu. Their field, cultivated and uncultivated, their fief estates, is held as a pledge for the dates, namely, thirty bushels, by Bel Nadin Shun. Another creditor shall not have power over it."

CHAPTER LIII

MORTGAGES

332. INTRODUCTION

333. COVENANTS

334. RECORDING

335. SECOND MORTGAGES

336. RELEASE

337. ASSIGNMENT

338. FORECLOSURE

339. TRUST DEED

340. QUESTIONS ON TEXT

332. Introduction. A mortgage is a conveyance of land given as security for the payment of a debt or other obligation. In form, it is substantially a deed with a defeasance clause attached. The defeasance clause contains the condition that, upon payment of the debt or the performance of the obligation, the instrument shall be void.

Failure to discharge the obligation resulted in the vesting of absolute title in the mortgagee, consequently it often happened that a mortgagor lost valuable property through not being able to pay promptly. Later the mortgagor was given a certain period in which to redeem his property upon payment of the debt, interest, etc., to date, thereby introducing a new right known as the "equity of redemption." In the majority of States the mortgage no longer conveys legal title but merely operates as a lien on the property to secure the payment of the debt.

333. Covenants. The mortgage, being a deed, is in writing and usually contains several covenants. Among these may be men-

tioned one which provides that, in the event of default in the payment of any installment of principal or interest, the entire debt shall become immediately due. Others provide for the payment of taxes and assessments, insurance, etc., by the mortgagor. Covenants relative to foreclosure may also be included.

334. Recording. As with other deeds, in order to charge subsequent purchasers with notice, it is necessary to record the mortgage similarly, although the instrument is valid as between the parties without this formality. Memorandum of the book and page number of the official record is made on the back of the instrument when it is entered in the recorder's archives.

335. Second Mortgages. Besides the first, the owner of the property may execute second and other subsequent mortgages. All mortgages will take priorities according to their respective dates of execution where the various owners have notice of the existence of the other mortgages, otherwise they will take priority according to their respective dates of record.

336. Release. Upon payment of the debt or performance of the obligation, the mortgage becomes void, and the mortgagor is entitled to a release of the mortgage in order that the same may be recorded and the title discharged of the lien.

337. Assignment. The interest of the mortgagee is assignable, but any transfer of this interest must be by an instrument of equal rank, in writing and under seal.

338. Foreclosure. If the debt is not paid when due, the mortgagee's remedy is to foreclose his lien. Foreclosure is a proceeding in equity whereby the creditor proves the amount of the debt, including interest and other charges, then the property is sold by and under direction of the court. If the proceeds of the sale are more than the debt plus all charges, the balance is applied towards the payment of junior mortgage debts in order, if any; if there are none then it is paid to the mortgagor. If the property sells

for less than the debt and accrued charges, a deficiency decree may be entered against the mortgagor for the remainder.

In several of the States a deed is not executed to the purchaser immediately after the sale, but the mortgagor and others having an interest in the property are given a certain period in which to redeem the property, by payment to the purchaser the amount paid by him with interest to date. If the redemption is not made within this period a deed is then executed and the foreclosure is complete. (See Case No. 62.)

339. Trust Deed. This is an instrument creating an active trust; that is, one where the trustee is required to take active measures to protect the interests of the one creating the trust or the one in whose favor the trust is created. In some of the States a trust deed is used instead of a mortgage. In a mortgage there are only two parties to the instrument; viz., the mortgagor and the mortgagee. While in a trust deed there are three parties; viz., the grantor, the trustee, and the one for whom the trust is created called the cestui que trust, or beneficiary.

340. QUESTIONS ON TEXT

What was the early common law mortgage? How did it differ from a modern mortgage? What is "equity of redemption"? What covenants may be found in a mortgage? What are the rights of junior mortgagees? How is a mortgage assigned? How is the mortgaged property discharged of the lien? How does the mortgagor enforce his lien for non-payment of the mortgage debt? What is a trust deed?

CHAPTER LIV

TITLE

341. INTRODUCTION

342. DEEDS

1. Quit-Claim Deed

2. Warranty Deed

343. RECORDING

344. ABSTRACT OF TITLE

345. TORRENS REGISTRATION

346. WILLS

1. Short Form

2. Formal Will

347. REAL PROPERTY CONTRACT OF SALES

348. TRUST DEED OR MORTGAGE NOTE

349. POWER OF ATTORNEY

350. QUESTIONS ON TEXT

341. Introduction. Title consists of the means whereby an estate, right or interest in property is acquired or held by the owner or transferred by him to another person. According to the manner in which it is acquired title is divided into two classes: (1) title by descent and (2) title by purchase. Title by descent is the title with which an heir is invested by operation of law in the inheritable estates held by an ancestor at death. All other means of acquiring title are included in title by purchase.

342. Deeds. A deed is a written instrument, signed, sealed and delivered, transferring title to real property from one person, called the grantor, to another person, called the grantee. To be effective the deed must be in writing; it must sufficiently identify the grantor, the grantee, and the property to be transferred; it must contain words of conveyance; it must be properly executed (that is, signed, sealed and acknowledged) and it must be delivered and accepted. It becomes effective upon delivery.

1. *Quit-Claim Deed.* A quit-claim deed is one which merely conveys whatever interest the grantor has in the property and nothing more.

2. *Warranty Deed.* Besides conveying the interest of the grantor the warranty deed contains certain covenants which are personal undertakings on the part of the grantor, usually five or six in number. The grantor warrants that he has the right to convey the property; that it is free from all encumbrances, charges and liens; that the grantee will have quiet and peaceful possession of the premises; that if it is necessary to further perfect the grantee's title, the grantor will procure the requisite deeds; and, lastly, that he will forever warrant and defend for the grantee the title conveyed by the deed.

343. Recording. Provision is made by statute for the recording of all deeds and other instruments affecting real property and the title thereto. Recording the instrument gives notice to all persons who may be interested in the property of the rights of the grantee under the instrument, and the instrument as recorded gives priority of right to the grantee from the date of recording.

Persons having actual knowledge of the existence of an unrecorded deed are bound, the same as if the instrument had been recorded, it is only subsequent purchasers without knowledge of the unrecorded instrument that are protected by the recording law.

344. Abstract of Title. An abstract of title is a synopsis of all instruments of record affecting the land, from the issuance of the original grant or patent to date. When made by a reliable firm or company the abstract is said to be merchantable, and when endorsed by the makers is generally accepted as correct. As a further safeguard, however, many of the abstractors issue guarantee policies, warranting the title of the last holder of record as clear, the value of the policy, however, is determined by the financial standing of the guarantor.

345. Torrens Registration. On account of the complexity of the record of the various instruments, etc., which may affect an individual piece of property if it has passed through many hands,

and the difficulty in detecting all possible clouds on the title, a number of States have adopted what is called the Torrens System of Title Registration. This is a judicial method of keeping a title clear and guaranteeing it to the owner. By this method the owner of land having acquired title petitions a court having jurisdiction to have his title made a record of the court. A court officer makes an investigation of all the records, notifies possible parties of interest, advertises the proceedings, and finally the court enters a decree as to ownership and issues a Torrens certificate. Thereafter all liens or claims against the property must be registered on this certificate. A transfer of title is quickly effected as no examination back of the date of the certificate is necessary. The title is guaranteed by either the county or the State.

346. Wills. Title to property may be acquired by will. A will is an instrument executed by the maker, called the testator, in which he disposes of property, such disposition, however, to take place after his death. Real property transferred by will is called a devise and the recipient a devisee. The execution of a will is controlled by statute and the statute must be strictly adhered to. The executor is the person designated by the testator to carry out the terms of the will, while if there is no executor or no will an administrator will be appointed by the probate court. Transfer of title by will or administration will appear in the abstract. When no will directs the disposition of the deceased person's property the statute of the State relating to descent and distribution is followed. (See Case No. 63.)

The following is a copy of the will written by a former Chief Justice of the Supreme Court of the United States. It was admitted to probate and fulfilled all requirements:

1. SHORT FORM WILL

"This is my last will. I give, bequeath and devise to my wife,.....
.....
in complete and perfect ownership, all my rights and property of every
kind and nature, whether real, personal, or mixed, wherever situated,
appointing her executrix of my estate without bond, and giving her seisin
thereof."

(Witnesses)

(Signed)

2. FORMAL WILL

In the Name of God, Amen.

I, Wm. A. Harvey of Rock Island in the County of Rock Island and State of Illinois being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare, this to be my last **Will and Testament**;

First, I order and direct that my Executor hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

Second, After the payment of such funeral expenses and debts, I give, devise and bequeath to my son, Henry J. Harvey, 20 U. S. Bonds of the denomination of \$1000.00 each.

Third, I give, devise and bequeath to my daughter, Helen I. Harvey, my apartment house and lot in the city of Rock Island known as "Lakeview."

Fourth, I give and bequeath to the Mary Thompson Hospital of Chicago, Ill., the sum of three thousand dollars.

Fifth, I give, devise and bequeath to my wife, Florence R. Harvey, all the rest, residue and remainder of my real and personal property. This in lieu of dower.

Lastly, I make, constitute and appoint Henry B. Brown of Moline, Illinois, to be Executor of this, my last Will and Testament, hereby revoking all former Wills by me made.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, the fourteenth day of March in the year of our Lord one thousand nine hundred twenty-five.

William A. Harvey [Seal]

This Instrument, was on the day of the date thereof signed, published and declared by the said testator Wm. A. Harvey to be his last Will and Testament, in the presence of us who at his request have subscribed our names thereto as witnesses, in his presence, and in the presence of each other.

Witnesses

Aaron E. Brown

James K. Spinner

TRUST DEED OR MORTGAGE NOTE

This is a Principal Note described in the within mentioned Trust Deed.

Registered *Jan 2* 1925
 REGISTER NO. *3125*
Seely Gridley

\$5000.00

Libertyville, Illinois.

Jan 2 1925

Five years after date, for Value Received, *five*
 Promise to Pay to the order of *William Whigam*
 the principal sum of *Five thousand & no/100* DOLLARS.

in gold coin of the United States of America of the present or an equal standard of weight and fineness,
 with interest thereon until the maturity hereof, at the rate of *six (6%)* per centum per annum, payable
Semi annually, on the *2nd* day of *July* and of *January*
 in each year, according to the tenor of and as further evidenced by *Ten (10)*

interest notes or coupons of even date herewith. Both principal note and interest coupons are payable

at the FIRST NATIONAL BANK, in Libertyville, Illinois,

or such other place in said city as the legal holder hereof may from time to time in writing appoint.

This note and the coupons attached are secured by a Trust Deed of even date herewith to
J. SEELY GRIDLEY, Trustee, on Real Estate in Lake County, Illinois, and shall bear interest at the rate of
 seven per cent per annum after maturity.

Principal Note No. *152*

Loan No. *214*

Geo B Miller
Emily G Miller

PRESERVE THIS NOTE TO OBTAIN RELEASE OF TRUST DEED

COUPON NOTE

This is one of the Interest Coupons described in the within mentioned Trust Deed.

Registered *January 2* 1925
 REGISTER NO. *3125*
Seely Gridley

\$100.00

Libertyville, Illinois.

Jan 2 1925

Due to the Order of *William Whigam*
 the sum of *One Hundred Fifty & no/100* DOLLARS.
 in gold coin of the United States of America, of the present or an equal standard of weight and fineness,
 on the *second* day of *July* A. D. 192*5*

at the FIRST NATIONAL BANK in Libertyville, Illinois,
 or such other place in said city as the holder hereof may from time to time in writing appoint, with interest after
 maturity until paid, at the rate of seven per cent. per annum, being for an installment of interest due on that day
 upon *one* principal Promissory Note, of the same date and payable to the same order as this Interest
 Coupon, *five* years after its date, for the sum of *5000.00* secured by a Trust Deed
 upon Real Estate in Lake County, Illinois.

Loan No. *214*

Interest Coupons No. *1*

Geo B Miller
Emily G Miller

PRESERVE THIS COUPON TO OBTAIN RELEASE OF TRUST DEED

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, Horace F. Smith, of Chicago, do hereby appoint J. W. Moody, of Chicago, my attorney and representative at Chicago in relation to (here set out the general matters of the appointment) to attend to and carry out all matters in which I may be interested, and in my behalf to execute all instruments and to do all such other matters and things as fully and completely as if I were personally present.

IN TESTIMONY WHEREOF, I have set my hand and seal this twenty-third day of June, 1925.

Signed, Sealed and Delivered
in presence of

Horace F. Smith (Seal)

R. A. Jones

E. S. Snyder

..... (Seal)

State of Illinois }
County of Cook } ss.

I, Wm. K. Saunders, a Notary Public in and for, and residing in the said County, in the State aforesaid, DO HEREBY CERTIFY, that Horace F. Smith personally known to me to be the same person whose name is subscribed to the foregoing Instrument appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said Instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this twenty-third day of June A. D. 1925.

Wm. K. Saunders.

SEAL

My commission expires Sept. 1, 1925.

347. Real Property Contract of Sales. The most common method of acquiring purchase title is by a bargain and sale transaction. When the price of a lot or tract of land is agreed upon, it is customary for the purchaser or the owner to enter into a written contract for the purchase of the land. The procedure is about as follows:

(1) The seller and purchaser enter into a written contract, the one to sell and the other to buy. This agreement should name the consideration, the description of the land, the time of execution,

the kind of a deed, abstract of title and other items if any, and should be signed by each party, each party having a copy.

(2) The seller causes to be made out an abstract of title which is guaranteed by some abstract and title company, or the purchaser has his attorney examine it. If the title is under the Torrens System the proper entry is made on the certificate of title.

(3) The proper deed is made out for transfer of title, a mortgage is made out covering the balance of the purchase money. A principal note and coupons are made out for the amount called for in the mortgage or trust deed.

(4) The papers—deed, mortgage and mortgage note or notes and coupons—are signed, and the deed and mortgage are filed with the county recorder or recorder of deeds and the transfer is complete.

(5) The negotiation of the sale, drawing and signing of all papers, such as contracts of sale, warranty deeds, mortgage for part of purchase money, abstract of title, notes and coupons, may all be carried out “by an agent acting under a power of attorney.” (See page 321.)

The main note may be divided up into smaller notes as, instead of one principal note for \$5000.00, there may be five \$1000.00 notes, each with its corresponding coupons. The several notes may be held by as many parties. This facilitates the negotiating of the loan. One trust deed or mortgage is security for the aggregate of the notes and coupons.

348. QUESTIONS ON TEXT

What is title? What is a deed? Name and distinguish the various kinds of deeds. What is meant by recording and what is its effect? What is an abstract of title? How does the Torrens System operate? What is a will? Describe steps in sale of real property when part payment is made.

CHAPTER LV

MISCELLANEOUS TOPICS

349. APPLICATION OF COURT DECISIONS TO FACTS

350. HYPOTHETICAL PROBLEMS

351. CONSTRUCTION WORK

352. MOOT COURT CASE

353. SEARCH QUESTIONS (STATE LAWS)

349. APPLICATION OF COURT DECISIONS TO FACTS

1. Fixtures that are Removable and those that are not Removable.
Facts: A, living in the city of B, sells his house and lot to C. The contract of sale makes no provision about articles usually termed fixtures. There is a wooden fence around the lot. The house has steam heat, electric light, gas, and the usual equipment necessary for such improvements. It also has many other detachable articles. A, before leaving the place, wants to remove certain chattels from the premises. C objects to such removal, claiming that they are part of the realty which cannot be removed without his consent.

Ruling Cases: *Goodrich v. Jones*, 2 Hill N. Y. 142; *Raymond v. Strikland*, 124 Ga. 504; *McKeage v. Hanover Ins. Co.*, 81 N. Y. 38; *Bullard v. Hopkins*, 128 Iowa 703.

- (a) At the time of the sale, a part of the fencing material that has been used as a part of the fence around the lot was detached without any intent to divert it from such use. Has A a legal right to remove such part of the detached fence?
- (b) Can A remove an electric chandelier attached to the house, and removable without injury to the building?
- (c) Can A remove gas fixtures which are screwed onto the gas pipes?
- (d) Can A remove a mirror that is set into the wall, and also another mirror that is not set into the wall, but is supported on hooks so that it can be severed without injuring the wall?

- (e) The shelves in the pantry and closets are loose. Can A remove them?
- (f) The front room in the basement of the above house is used for a grocery store. Can A remove the counters and show cases in the store room of the house?
- (g) If a person sells a house and desires to avoid a dispute about the fixtures, what provision should be inserted in the contract of sale?

2. Leases. Facts: A rented a house for residential purposes from B for a period of two years at a rental of \$50 per month, payable on the first day of each month.

Ruling Cases: *Olt v. Lohnas*, 19 Ill. 576; *Hanley v. Banks*, 6 Okla. 79; *Roth v. Adams*, 185 Mass. 341; *Rubens v. Hill* 213 Ill. 539; *Martin v. Sexton* 112 Ill. App. 199; *Sexton v. Chicago Storage Co.*, 129 Ill. 318; *Cook v. Jones*, 96 Ky. 283, and Statute of Frauds.

- (a) Must the lease be in writing?
- (b) If the above house had been rented for six months instead of two years must the lease be in writing?
- (c) If the house had been rented for only one year, but the lease was made by word of mouth before the commencement of the term, must it be in writing?
- (d) If, after A has entered into possession of the house, B raises the house and does the work in such a manner as to interfere seriously with B's possession and use of the house, has A an action for breach of covenant?
- (e) If, after A takes possession of the house, he finds that it is not in a tenantable condition, has A an action for the breach of covenant?
- (f) If the house needs repairs before the expiration of the term, and the lease is silent as to repairs, who must repair it, A or B?
- (g) May A rent out (sub-let) two rooms of the house to C?
- (h) May A assign his lease to D?
- (i) In general what is the difference between an assignment and a sub-letting?
- (j) If A fails to pay rent on the first day of the month, what may B do?
- (k) If, at the expiration of the two years' term, A does not surrender his premises, what may B do?

350. HYPOTHETICAL PROBLEMS

1. A, having held a farm for three years, has put up a shed for sheep. It consists of a roof supported by posts driven into the ground. A's tenancy is about to expire and he proceeds to remove the shed. It can be removed in sections and set up elsewhere. The landlord forbids the removal. Discuss rights of parties.

2. The tenant of a store found, on taking possession, that

several panes of glass were broken, and he put in new glass at his own expense. He also took out the sash in the front of the store and put in large sheets of expensive plate glass. Just before the end of his term he commenced to take out the panes of glass, and also to take out the plate glass, intending to restore the former sash. The landlord seeks to restrain him by injunction. Can he do so?

3. A mortgaged land to B; afterwards A conveyed the land to C who had knowledge of the mortgage. C recorded his deed; afterwards B recorded his mortgage and subsequently C sold and conveyed the land to D, who recorded the deed to him. Is B's mortgage good against D?

4. A has a mortgage for \$1,000 on land, which is prior in right to a mortgage for \$2,000 held by B on the same land. C has a mortgage for \$2,000 on the land, which is prior to that of A in right, but is junior to that of B. The land is sold in a foreclosure suit, and the proceeds of sale, amounting to \$3,000, are brought into court for distribution. How should the liens be marshaled?

5. A mortgaged to B for \$5,000. M owed A \$1,000 on a book account. B assigned the mortgage to C, who notified A. While C owned it he became indebted to A on a book account for \$2,000. C assigned the mortgage to D, who began to foreclose. Advise A whether he can defend.

351. CONSTRUCTION WORK

In the following you are Mr. Jos. W. Mattes, attorney, and you are instructed to draw these papers:

1. Draw a land contract for the following: Grantor, Edward T. Taylor and Jean W. Taylor, his wife; grantee, John Graynor; consideration, five thousand dollars; one thousand dollars on the signing of this instrument, one thousand dollars when a warranty deed is delivered, and the balance three years after date; interest at six per cent per annum, payable semi-annually, secured by mortgage; that tract or parcel of land, city of Chicago, county of Cook, State of Illinois, lots No. 20 and 21 Gordon Strong & Co. Subdivision, said lots north of Logan Boulevard and west of California Avenue, a front of 30 feet to each lot and a depth of 175 feet.

Waive homestead rights, and party of the second part to pay all taxes levied and to be levied.

A minimum building limitation of \$2,500, front of building not to be within 20 feet of sidewalk line.

2. Draw the warranty deed for the above.

3. Draw the principal note and six coupon notes.

4. Draw the mortgage for the above.

5. It is found that William W. Taylor as heir at law has a partial claim to the above described real estate, but will release his interest for one hundred dollars. Make out a proper quit-claim deed.

Write a letter to Mr. Edward T. Taylor explaining the situation and make a request for remittance to cover the expenses.

6. Draw a release deed for the cancellation of the mortgage.

7. Have all the above papers that require it acknowledged before you as a notary public.

352. MOOT COURT CASE

Action: This is an action for an injunction.

Facts: Mr. A owns a two-story apartment, living in one and renting the other to Mr. B. During the term of the lease Mr. A made quite a number of improvements, greatly improving the appearance of the property. He put in new chandeliers and a mantel at a cost of \$200.00, confining this to the apartment that he occupied and the hall. Mr. B noticing the change, asked Mr. A to equip his apartment and he, Mr. B, would pay for the improvement. There was also solidly built into each apartment a library cabinet at a cost of \$150.00. Each occupant paid for his own case. There was also a double garage of collapsible construction erected on the rear of the lot. Expense paid jointly by Mr. A and Mr. B. Mr. A sells the house and lot to Mr. C, the transfer to take place at the termination of Mr. B's lease. Mr. A and Mr. B move out and intend to take with them the garage, chandeliers and bookcases. Mr. C demurs to this and starts court action to prevent it, based on the ground that he purchased the property from Mr. A and that these articles in question are fixtures and belong and pass with the real estate.

Issue: Will the injunction be granted?

353. SEARCH QUESTIONS (STATE LAWS)

As a general rule how is land described in deeds?

Are there any restrictions placed upon aliens regarding ownership of real estate?

May an alien inherit real estate? If not what is done with the property?

Are there any rules relating to the escheating to the State? What are they?

Is the title to roads in the landowner or in the municipality?

Are rights to rivers and inland lakes in the individual or in the public?

Are hunters allowed to cross fields in quest of game?

What are the dower rights of the state?

- May a wife hold and alienate real estate the same as a man may?
- Is there a homestead exemption law and what is the amount?
- How many witnesses are required in a will?
- Is there an inheritance tax? What is the rate?
- Is the Torrens System used in your State?
- How is a real property mortgage foreclosed?
- How is a chattel mortgage foreclosed?

APPENDIX

DECISIONS BY THE COURTS

CONTRACTS

1. In *S v R*, an infant sold a horse, and upon the question whether he could avoid the contract during his minority, it was *said*: "The true rule appears to be this, that where the infant can enter (as in the case of land) and hold the subject of the sale *till his legal age*, he shall be incapable of avoiding till that time; but where the possession is changed and there is no legal means to regain and hold in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission *immediately*."

2. In *M Co. v. H*, 79 N. Y. 541, H had executed a mortgage and had received the benefit under it. It was alleged that she was insane. Under the maxim that "he who seeks equity must do equity," it was set forth that the defendant could not retain the benefit of the contract and at the same time deprive the plaintiff of his remedies, and it was HELD that an execute contract, when the parties had been dealing fairly and in ignorance of the lunacy, *should not afterwards be set aside*. A contrary doctrine would render all ordinary dealings between man and man unsafe.

3. In *A v. J*, 43 Vt. 78, plaintiff published an item in his paper at the solicitation of the defendant that was a libel of one G. A bond to indemnify plaintiff was given by defendant. Judgment was secured by G against the publisher, and action was brought by the plaintiff against defendant to recover on the bond. HELD that the indemnity bond was illegal and therefore non-enforceable. The court said, "I know of no case in which a person, who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the offense."

4. In *H v. B*, Atl. 17, R. I. 13, the defendant contracted to teach French for the plaintiff and contracted not to teach French *anywhere within the State for a period of one year after* said term of service expired. Contended that contract was void on the ground of public policy, also that contract was unreasonable. A contract is not, however, necessarily either void or unreasonable because the restriction covers one of several States. Conditions are constantly changing. What is unreasonable now may not be unreasonable to-morrow. In determining the solution one must decide whether the restriction is necessary, whether it benefits one of the parties. "Wherever a sufficient consideration appears to make it a proper and useful contract, such as can not be set aside without injury to a fair contractor, it ought to be maintained—but with this constant diversity, viz., where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a par-

ticular place; for the former of these must be void, being of no benefit to either party and only oppressive." It was HELD that since the teaching was in another town, and not necessarily detrimental, the contract should not stand.

5. In *Flanagan v. Kilcome* 58 N. H. 443, K. was indebted to F. for a certain sum of money which was due. Suit was commenced for the collection of the debt. K. now promises to pay a certain sum if the suit was dropped. To this F. agreed. Later K. refuses to pay and suit is brought on the promise to pay. The court HELD that this promise constituted a *valuable consideration* and was sufficient consideration even though the original suit might have been defeated.

6. In *Mills v. Wyman* 20 Mass. 207, the facts were as follows: A son of Wymans, aged 25, was taken sick and cared for by Mills until he died after an illness of 20 days. W.'s father wrote M. an appreciative letter and promised to pay for the services rendered his son. It was contended by M. that the services rendered constituted and established a contract.

It was HELD that this was a promise for a consideration that was *past*. The father was influenced by gratitude when he made the statement. Past services rendered without expectation of pay are not sufficient to support a contract. The promise was a *moral obligation* the value of which courts cannot determine.

NOTE. A new consideration paid for the services by M. would have constituted a valid contract.

7. In *Velie Motor Car Co. v. Kopmeier Motor Car Co.* a written agreement was entered into whereby the K. M. C. Co. was granted the exclusive right to sell autos in a certain territory. They were obligated to buy fifty machines, but the Velie Co. were not obligated to sell any. The K. Co. did not order any machines during the season.

Suit was brought for breach of contract for not buying 50 machines.

The Court HELD that inasmuch as the V. Co. had the right to fill the order or not as it saw fit, there was no mutuality in the agreement and therefore it was not binding. The law looks on *mutuality as a fundamental in contracts*.

8. In *Rouail v. Krohne* 31 Pa. 130, an owner of a building operation, fearing that men employed by the contractors would quit work, said to them: "I want you men to stay with the job and complete it, and if you are afraid that you will not get your money, I will see that you get your pay." HELD, that the undertaking of the owner was a promise to pay the *debt of another*, and, not being in writing, was void under the Statute of Frauds.

9. In *Wetopsky v. New Haven Gas Light Co.* 88 Conn., the defendant sold a house to the plaintiff who intended to remove the house to his lot across the street. A good and valuable consideration was paid. Later refusal was made in regard to the right of removal and suit was brought. It was contended that this was a sale of a chattel and not a sale in land or an interest thereof, therefore the agreement need not be in writing. A Mass. case says "It may be difficult in many cases to determine, from the terms of the contract, whether the parties intend to grant a present estate in the trees while growing or only a right, either definite or unlimited as to time, to enter and cut with title to the property when it becomes a chattel. If the former be the true construction, then it comes within the statute and *must be in writing*;

if the latter, then though wholly oral it may be enforced." *Judgment for the plaintiff.*

10. In *Haussman v. Burnham* 59 Conn. 17, a conveyance of land was made to H. in 1885 based on an oral promise to reconvey to another whenever requested to do so. Later in 1888 the request was made and the land reconveyed as directed. Later, heirs sought to set aside conveyance and following reasons assigned: (a) That there was no consideration for the promise. (b) That the agreement was contrary to the rule requiring a contract not to be performed within one year must be in writing. (c) That agreement to transfer land must be in writing. (d) That a written contract cannot be defeated by oral agreement.

The Court HELD that (a) the *detriment* that H. sustained was a *sufficient consideration*. (b) That the contract was capable of being performed within a year. (c) That the contract having been performed satisfied the Statute of Frauds. (d) That the oral contract did not change the effect of the written agreement.

11. In *Rantoul Co. v. Claumont Paper Co.* 196 F. 305, 116 C. C. A. 125, a contract by the plaintiff to deliver pulp to defendant, and to receive from defendant at a specified price a particular quality of paper to be manufactured therefrom, HELD not within the Statute of Frauds. In *Banscher Bros. v. Gies Estate* 160 Mich. 502, an agreement by which dishes are to be manufactured for one with his monogram thereon, though the transaction is to result in a sale thereof to him, *is a contract for work and labor*, and not for sale, and so not within the Statute of Frauds; the dishes when so manufactured not being fit for the general market, but intended to suit the special use of the person for whom they were manufactured in his particular business. In *Tower Grove Planing Mill Co. v. McCormick* 127 Mo. App. 349, an order for sashes and doors for a special purpose to be manufactured by the seller at a stated price of \$250.00, to be paid on completion of the work, is a contract for *the sale of goods* and not for labor, within the Statute of Frauds providing that no contract for the sale of goods of the price of \$30.00 and upwards shall be good unless in writing.

12. In *Riegel v. American Life Ins. Co.* 153 Pa. 134, R. was carrying as a security for a debt, a life insurance policy on one Leisenring amounting to \$6,000. R., to lessen the premiums, asked for a reduction of the policy to \$2,500. This request was complied with by the company. Unknown to both parties, L. was dead at the time the change was effected in the policy, and therefore the latter was due and payable. R. asks that the policy for \$6,000 be reinstated, but is resisted by the company. *It was HELD* that it was apparent that both parties acted on the belief that the insured was alive at the time the change was effected, that therefore there was no consideration for the difference between the two policies. The company parted with nothing and R. got nothing. It was clearly a *mutual mistake* and the court ordered the new policy cancelled and the old one reinstated.

13. In *Sykes v. Life Ins. Co. of Virginia* 148 N. C. 24, plaintiff was induced by fraudulent misrepresentations of an agent of defendant insurance company to take out certain policies, believing that they provided for life insurance for the term specified therein, and also for the subsequent repayment of the premiums with interest, when in fact they provided no substantial benefits except in the event of death. He paid the premiums until the expiration of

the term. HELD that, in action for damages for the *misrepresentations*, he was entitled to recover the amount of the premiums paid, with interest, as represented, without deduction for the benefit of insurance during the term of the policies.

14. In *Tyssowski v. F. H. Smith Co.* 35 App. D. C. 403, the gist of the action of deceit is the producing, with *fraudulent intent*, of a false impression upon the mind of the other party, and, if that result is accomplished, it is unimportant whether the means employed are affirmative or negative; that is, whether they consist of words or acts, or amount to no more than a concealment or suppression of material facts peculiarly within the knowledge of the guilty party.

15. In *Dixon v. Wilmington Savings and Trust Co.* 115 N. C. 274, the plaintiff at the request of her agent signed a certain document without reading it and on the assurance of her agent that she incurred no liability in so doing. The document was in fact a mortgage. The agent disposed of the mortgage to the defendant in the regular course of business and for value. The plaintiff now asks that the mortgage be cancelled, as it was obtained through fraud. The court HELD that the plaintiff was *grossly negligent* in the signing of the document and that since the rights of an innocent party intervened she was not entitled to relief.

16. In *Rider v. Kelso*, 53 Iowa 367, a young lady who had just arrived at the age of twenty-one was in the habit of consulting an uncle about all her business affairs. The uncle induced her to sign an agreement with a bank whereby she was to pay the sum borrowed if he did not. The uncle secured a considerable sum of money from the bank based on the agreement. He then left for parts unknown and the bank sought collection under the terms of the agreement. The bank knew of the relationship of trust existing between the parties. The court HELD this to be a case of *undue influence* and therefore not enforceable.

17. In *Williamson H. F. Co. v. Ackerman* 77 Kans. 502, action was had for the collection of notes and mortgages as security given by A. to secure payment of defalcation of \$4000 on the part of A.'s son. In securing the notes and mortgage A. was informed that his son was an embezzler of the company's money; that the one making the demand had a warrant for the arrest of A.'s son and a deputy sheriff was in the next room ready to serve the warrant and that his son would be convicted and sent to the penitentiary. A. signed the paper and action is brought for payment. The defense is *duress*. In summing up the case the court said "Under the modern theory, duress is to be tested, not by the nature of the acts or threats, but rather by the *state of mind* of the victim induced by such acts and threats." The important consideration is not whether there was ground for the arrest or imprisonment threatened, but it is rather whether the free will of the party making the contract was constrained by the threats of the other. It is so HELD. Judgment for the defense.

18. In *S v. W*, 1 Murphy, 426, the contract upon which suit was brought had been reduced to writing, but upon trial the plaintiff sought to introduce oral testimony of a warranty not contained in the writing. It was *said* that it is contrary to the common law to add anything to or contradict a written agreement by parol evidence. To admit it for the purpose of proving that the written instrument did not contain the real agreement, would be the same

as receiving it for every purpose. A written contract may be explained but not altered by parol testimony. The exception to the general rule may be comprised under the heads of frauds, surprise, mistake, cases of resulting trust, to rebut an equity, and to explain latent ambiguities.

19. In *Soutier v. Kellerman*, 18 Mo. 509, a contract was made for four thousand shingles in eight bundles and were paid for at the agreed rate. Later the plaintiff counted the shingles and found there were only two thousand five hundred and action is brought for the return of the money for the difference. It was contended that in the lumber business shingles are not counted but that two bundles equal a thousand shingles. It was HELD that this was true according to the *usage of trade*, and that therefore a proper delivery had been made.

20. In *B Co. v. C Co.*, 52 Fed. 700, the plaintiff contracted to furnish in the course of the year a large supply of printing and lithographs. A portion was not delivered until a few days after the year had elapsed, and the defendant refused payment. It was *said*: It is a general principle governing the construction of contracts that stipulate as to the time of their performance, that time is not necessarily of their essence; that unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement; and that where the intention of the parties does not so appear, performance shortly after the limit of time set by either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counter-claim for the damages he has sustained from the breach of the stipulation.

21. In *Rasmussen v. Holme Industry Iron Works* 199 F 990, 117 C. C. A. 666, a provision in a contract for the payment of a fixed sum for its breach, whether as a penalty or as liquidated damages, will not be enforced where it appears that *no damage* has been sustained. In *Horton v. Hollingsworth Co.* 30 App. D. C. 270, parties to a contract may validly stipulate that a certain sum shall be the damages which one shall forfeit to the other for failure to perform the conditions of the contract, especially where the damages sustained may be *uncertain in amount* and not easily ascertainable. In *Kay Gee Amusement Co. v. Cove* 177 Ill. App. 250, where there is doubt as to whether a deposit is intended as a penalty or liquidated damages, and the damages are easy of calculation, the court is inclined to treat it as a *penalty* and inquire into the *actual damages*. In *Mount Airy Milling & Grain Co. v. Runkels* 119 Md. 371, where a contract stipulating an amount as liquidated damages is partly performed, the stipulation will usually be recognized as a penalty permitting award of actual damages only.

22. In *S v. H.*, 20 Atl. 232, 17 R. I. 109, the plaintiff agreed to work for defendant as clerk in a grocery and liquor store, the sale of liquor being illegal. Recovery sought for salary earned. Contended that the contract was illegal. HELD, had one price been agreed upon for the services as bar-tender and another as clerk in the grocery business, so that it would have been possible to separate the legal from the illegal part of the transaction, an action could have been maintained for those services which were legal; but, as it was, the defendant's contract being *entire*, and consideration for it being partly legal and partly illegal, and indivisible, both parties were to be regarded as equally in fault, and the law will lend its aid to neither.

23. In *Schwantkowsky v. Dykowsky* 63 Tex. 83, the maker of a series of notes payable at yearly intervals, which provided that, on any default in payment of principal and interest, the holder might declare the whole series due, made a tender, at maturity of the first note, of the amount and of interest on all of the others except the last, claiming a credit, applicable to the last note, sufficient to satisfy it. The credit as finally determined was insufficient to meet the whole note. HELD that, as interest was due on the balance, the tender was insufficient in amount, so that the holder could properly refuse it and elect to mature the whole series. In *Mut. Ins. Fire Ins. Co.* 106 Me. 345, where a tender made by defendant insurance company is too small by 9 cents, HELD the tender is insufficient.

24. In *Hobbs v. Crawford & Maxwell* 4 Ga. App. 585, providing that, where a payment is made by the debtor to a creditor holding several demands against him, the debtor has the right to direct the claim to which it shall be apportioned, but that, on his failure to do so, the creditor shall have the right to appropriate at his election; *a creditor, in the absence of directions, may apply payments made on a running account of several years to the oldest items*, so as to avoid the bar of the Statute of Limitations, and this right is not defeated by the fact that the balance due at the end of each year is brought forward as such as the first item of the succeeding year's account, provided the aggregate amount actually purchased within the statutory period of four years is greater than the unpaid balance claimed to be due. In *Bankers' Security of Cleveland, Ohio v. Maxwell* 222 F. 797, 138 C. C. A. 345, a creditor, who has two claims against his debtor, one secured and one unsecured, in the absence of special directions to the contrary, may apply funds in his hands on the unsecured claim.

25. In *C v. G*, 163 Mass., the plaintiff was under a five-year contract with defendant, but was discharged after three months' service. Question, If suit is brought before expiration of term, may damages be assessed for full time? The trial court allowed damages to be assessed to the time of the trial, and from the trial to the expiration of the five years. In 24 Ala. 194; 75 Tex. 196; 7 Wis., if suit is begun before the expiration of contract period, damages can only be allowed to time of trial. In 31 Vt. 582, damages may be claimed for full term irrespective of time of bringing suit. In 67 Me. 64, in an action brought for damages at end of period, it was HELD damages were stipulated wages less whatever sum plaintiff earned or might have earned by use of reasonable diligence. Same in 44 Pa. 99. This is also the English rule. The suit is not for wages but for damages. In estimating *damages* the jury have the right to consider the wages which he would have earned under the contract, probability of life, working ability, and any other uncertainty, and likelihood that plaintiff would be able to earn money in other work. The same kind of difficulty is encountered in assessing damages in a personal injury case. The liability for the damages which he inflicts by breaking his contract, is one which the defendant must be taken to have understood when he wrongfully discharged the plaintiff, and, if he did not wish to be subjected to it, he should have kept his agreement.

26. In *McGuire v. Brandsfield* 147 Ill. App. 541, a contract was entered into for the repair of a building for \$100.00. Suit was brought for the collection of this claim. The defense offered that the work was so poorly done that it was necessary to pay \$125.00 to repair damages caused by the plaintiff.

Judgment was entered in favor of the defense for \$25.00. NOTE—While this is in reality a *set-off* it is known as a counterclaim. In some jurisdictions this is called *recoupment*.

27. In *Heery, Executor, v. Reed* 80 Kans. 380, shows an oral agreement wherein R. was to perform services for one D. on a farm and that for these services she was to receive his property at death. R. continued to perform her part of the contract for 21 years when she was wrongfully discharged. At this time, through fraud, R. signed a receipt for \$200.00 "in full of all dues and demands." She signed this receipt under belief that it was an acknowledgment of payment on account. Suit was brought after the death of D. It was contended: (a) that the receipt showed accord and satisfaction, (b) that the Statute of Limitation barred the claim which should have been brought at time of breach, (c) that agreements not to be performed within a year must be in writing.

It was HELD (a) that the receipt was fraudulent as stated, therefore no accord and satisfaction, (b) that the Statute of Limitations began from the death of D. and as R. was wrongfully dismissed she was at all times ready to perform her part of the contract and (c) that the Statute of Frauds did not apply as the contract was capable of being performed within a year.

28. (a) In *Masterton v. The Mayor*, 7 Hill, 61. M. agreed and contracted to deliver marble for use in the construction of a building. Part of the marble contracted for is delivered when the contract is broken by a refusal to receive the balance. The damage is to be measured by the loss of the profits on part not delivered and is recoverable.

(b) In *Green v. Goddard*, 9 Met. 212, a money debt due and payable, action was had for damages for non-payment. It was HELD that profits that might have been made were speculative and not recoverable, but that the measure of damages was the loss of interest on the debt.

(c) In *Little v. Boston, Me., R. R. Co.* 66 Me., 239, relates to the loss of a package sent by carrier. The contents of the package were not known to the carrier. The package was lost. The carrier was HELD liable for the value of the lost package.

29. (a) In *Lowe v. Law* 27 Calif. 483, an "account stated" is an agreement between parties who have had previous transactions of a monetary character that all items of the account representing such transactions and the balance struck are correct, together with a promise express or implied for the payment of the balance.

(b) In *Little v. McClain* 118 N. Y. 916, a statement as follows: "Mr. R. McClain in account with Herbert L. Norton, Assignee for E. B. Havens & Co.

Dr.		Cr.	
1907	Amount		
May 22 To balance	\$1982.30	50 Cent Lea	\$1142.75
		By Balance	839.55
	\$1982.30		\$1982.30
May 22 To Balance	\$839.55"		

This sent to the debtor was an *account rendered*.

(c) In *Fayette Liquor Co. v. Jones* 75 W. Va. 119, uncontroverted proof that the correctness of an *account rendered* has been admitted by failure to dispute it within a reasonable time authorizes recovery, without resorting to the original entries or other proof.

(d) In *Allegheny County Light Co. v. Thomas* 31 Pa. 102, an *account stated* may be opened or falsified on proof of mistake. Such an account is only *prima facie* evidence of its correctness and may be impeached by clear, precise, and satisfactory evidence either of unfairness or mistake.

30. In *Miller v. Shay*, 145 Mass. 163, Miller was hired to haul sand for building purposes for one Shay. The bookkeeping record was chalk marks on the side of the cart for each load hauled. These marks were each evening transferred to a memorandum book. The Court said: "The small account book kept by the plaintiff showing the number of loads of sand delivered, was properly admitted in evidence. It was a rough and imperfect book of account, but it was honestly kept and was the record of the daily business of the plaintiff, made for the purpose of establishing a charge against another. Such a book, supported by the oath of the plaintiff, is competent, though the account was kept only by marks, the plaintiff being unable to write. These entries are intelligible and no more liable to fabrication than other entries. *It is a book of original entries*, though the marks were transferred from marks made on the cart by the servants of the plaintiff who delivered the sand."

31. In *J v. D*, 17 Ill. 433, is considered the question of an agent signing the name of the principal to contracts to satisfy the Statute of Frauds. This was for the specific performance of a contract for the sale of land. H was an agent with verbal appointment to sell the land in question, and a contract was made with J in which H signed the name of D "per H." It was contended that H had not authority to sign the name of principal, only authority to sell. HELD that the agent was authorized to negotiate and conclude the sale, and for that purpose authority was *implied* to do for his principal what would be incumbent on the principal to do to accomplish the same thing in person.

32. In *C v. S*, 142 Pa. 25, defendant was real estate broker and attempted to serve two masters. The plaintiff paid him a commission of \$5,000 for effecting a sale of certain real estate in ignorance of the fact that he was also the broker or agent of the purchaser. When she discovered that he was acting in the dual character, she brought suit to recover the money so paid. HELD that the money so paid was recoverable. It did not depend upon the character of the sale, whether advantageous or otherwise; it rests upon the higher ground of public policy. The fiduciary relation existing between agent and principal is one of highest faith and the law protects it.

33. In *M v. E*, 94 Mich. 100, agent acted for *both* parties. Was to receive commission if he sold certain land for \$9,000. At the same time agent represented prospective purchaser. He subsequently introduced parties. Sale was consummated. Purchaser paid regular commission. Seller paid part and resisted balance. HELD agent could recover. Nothing was left to the discretion of agent but to find a purchaser willing to give the price asked, and it can be of no importance whatever to the defendants whether or not this purchaser also paid the plaintiff for any service he may have rendered them. As was said in *R v. D*, 78 Mich. 318: "A broker who simply brings the parties together and has no hand in the negotiations between them, they making their

own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other."

34. In *Peck v. Freese*, 101 Mich. 321, an agent secured from F. an order for a cash register. F. signed an order blank which included the following: "This order is given subject to your approval and it is expressly agreed that it shall not be subject to countermand." On reconsideration, F. decided that he did not want the cash register and therefore he wrote the home office before acceptance of the order by shipment of the machine:

"Dear Sir: You received an order from us for one Peck Register from your man O. W. Fort. Please hold the same until further notice.
Freese & Rohde."

The court HELD this to be a sufficient countermand of the order, therefore there was no obligation to pay for the register.

35. *D v. C*, 154 Mass. 360. Principles.—Legal effect of ratification. Plaintiff ordered coal of defendant. M, having no authority but *representing the defendant*, undertook to deliver the coal, and while so engaged broke a plate-glass window. Defendant presented a bill for coal, having knowledge of act of M. Action brought for damages. "The delivery of the coal by M was ratified by the defendant, and that such ratification made M in law the agent and servant of the defendant." HELD that the defendant was liable for the *tort*. The ratification goes to the relation of the parties and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded and as he may be for those which he has expressly forbidden.

36. In *Brown v. Bradlee* 156 Mass. 28, a reward in the following words was offered:

"\$2,500 will be paid to any person furnishing evidence that will lead to the arrest and conviction of the person who shot Mr. Edward Cunningham, November 21st, 1889.

Milton, Nov. 22, 1889.

Signed J. Walter Bradlee
C. Edwin Ruggles
J. Albert Simpson
Selectmen of Milton"

Information desired was furnished as advertised. Later suit was brought against the selectmen personally for the reward. It was contended that the signers did not bind themselves personally but the town for which they acted as agents. It was HELD that the use of their official designation had no other effect than descriptive and that the signers were personally liable.

37. (a) Employers' Liability—Assumption of Risk—Minor Employee—Order to Work Faster. In *Stam v. Ogden Packing & Provision Company*, the defendant was engaged in the business of slaughtering and preparing meat for consumption. S., sixteen years of age, was in their employ as a laborer, and as such was operating a machine for preparing sausage casings.

He had had a few months' experience. He was directed by the foreman to hurry his work. S. complied, and as a consequence caught his hand in the machine and amputation was necessary. S. brings action for damages. The court said "It is clear that the employee's knowledge was sufficient to run the machine under normal conditions, but he is suddenly ordered to work faster. S. complied and was injured. *He had not been warned to be careful.* This is the turning point. It is not asserted that the order to work faster in itself is negligence, but that in viewing the evidence in this case, it is apparent that the employee should have been warned of the danger." Judgment affirmed.

(b) Employer's Liability—Fellow Servant—Relations of Co-workers—Volunteers. In *Gulfport & M. C. Traction Co. v. Faulk*, 80 Miss. 340. F. was employed by the company and worked with a man named Chambers as a "trouble shooter." C. was an experienced chauffeur and had a Ford for going from one job to another. C. assumed authority over F. although he was paid less. C. directed F. to crank the machine. It "kicked" and he, F., was injured. F. brought action against the company for damages. The court said there is no evidence to show that C. was a superior agent. They were merely fellow servants of equal degree. It is settled that the authority of an agent to bind his principal rests on authority conferred by the principal. It was no part of F.'s duty to crank or to have anything to do with the automobile except to ride in it. In attempting to crank it he is a mere "volunteer." The company is not liable.

(c) Employees' Liability—Fellow Servant—Vice Principals—Dual Capacity. In *Morin v. Rainey et al.* 207 Mo. 858, wherein one Morin was employed and was injured by the negligence of one Rainey, both in the employ of the American Car & Foundry Co., M. was engaged in skimming molten metal and R. was operating electric trucks transporting pots of molten metal. R. directed M. to adjust a pot on a truck and M. to do so went between two trucks, when R., without warning, started the trucks and M. was seriously injured. It was contended that R. was a fellow servant and if even a vice-principal he was a fellow servant so far as M. was concerned. "When plaintiff went upon the track between the trucks he did so, not of his own initiative, but in obedience to the *express command of the master* then and there issued by the vice principal Rainey, and it became the personal duty of the master to exercise ordinary care to keep safe the place where the plaintiff thus worked. And the plaintiff was entitled, within reason, to rely upon the implied assurance that this duty would be performed. HELD that if the master deputizes such a duty to a servant, no matter how low the latter may be in rank, as to that duty the acts of such servant become in law the acts of the master."

PARTNERSHIP

38. In *A v. B*, 67 Md. 53, A, a minor, paid into a firm a sum of money as consideration for being admitted a partner. He remained such for one year, then withdrew, as the business was not successful. No fraud was used in inducing him to enter the firm. Questions: the right to withdraw and the right to demand the return of money paid for admission to the firm, since he had enjoyed the benefits of the partnership. The questions were decided in the affirmative.

39. In *Giacomo Allegretti et al. v. The Allegretti Chocolate Co.* 177 Ill.

129, a corporation engaged in the manufacture of chocolate creams and confections in the city of Chicago. The stock is owned by Ignazio Allegretti, the father, and two sons Joseph and Nicholas. This proceeding is against I. A. Rubel, B. F. Rubel and Gracomo Allegretti, partners as Allegretti & Co. to enjoin and restrain the latter from making and selling chocolates under the trade-mark or trade name "Allegretti" claimed by the complainant as its trade name and used in its business. HELD. That every natural person has such right is undoubtedly the rule, yet that right is to be exercised "in the absence of any fraudulent or wrongful intention or act." Appellants may use the name "Allegretti" provided they do so in a manner that shows their goods are "manufactured and sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti of the Allegretti Chocolate Cream Co." Fraud and deception having been practiced, the court therefore sustains the judgment of the appellate court in that the use of the trade name shall not be used.

NEGOTIABLE PAPER

40. In the case of *H v. P*, the plaintiffs sued as assignees on a promissory note, "payable at New York, in New York funds, or their equivalent." The court said: "Whether it meant the funds of the State generally, or of the city of New York is not clear. The face of the note is indefinite, is susceptible of different interpretations, and for this reason it cannot be considered a negotiable instrument within the statute."

It is not a note, in the language of the decisions, *payable in money*. "Funds" may embrace stocks, banknotes, specie, and every description of currency used in commercial transactions. To be a note, it must be an unconditional written promise or order to pay a certain sum of money.

41. In *Kleeman v. Frisbie* 63 Ill. 482, a mortgage was given by K. to T. for an enumerated consideration of \$6,900, the major part of the same being an usurious charge. The mortgage was *assigned* by T to F who bought in good faith and for value.

K. brought suit to enjoin the payment of the usurious part of the contract. It was contended that the contract being acquired in good faith and for value was not affected thereby. It was HELD that the assignee takes a contract subject to the defense against the assignor, that as the latter could not have enforced the *usurious* part neither could the assignee.

42. (a) In *Britton v. Chamberlain* 234 Ill. 236, an action on a foreign judgment, interest is allowed thereon at the rate fixed by the law of the foreign state.

(b) In *Carney v. Matthewson* 86 Ark. 25, a note payable 13 months after date, with interest at the rate of 10% per annum, and providing that, if interest be not paid annually, it shall become as principal and bear the same rate of interest, is not usurious. In *Graham v. Fitts*, 53 Fla. 1046, payment of interest on overdue installments of interest evidenced by coupon notes for interest does not constitute usury, and is recoverable on coupon notes, after maturity, given at the time of the accrual of a debt for the interest thereon.

43. In *McCaskile v. Connecticut Bank* 60 Conn. 310 it was contended that a pass book contained all the elements and requirements of negotiable paper, but it was HELD "that the nature and purpose of savings banks, and

the relation of depositors to each other, as well as their mutual security, all require the application of the principle that no depositor can convey to another any greater right to the funds of the bank than he has himself, and that any defense on the part of the bank which is good against the original depositor is equally good against his assignee."

44. In *M N B v. H*, 33 Minn. 40, the plaintiff sent for collection to one, Luce, its agent, certain notes indorsed as follows: "For collection account of Merchants' National Bank, St. Paul." Before their maturity Luce transferred them by indorsement to the defendant in payment of his own private debt. It was HELD that the defendant receiving them with the above indorsement uncanceled, and without making any inquiry, acquired them not merely negligently but in bad faith and could not protect himself as a *bona fide* purchaser against the plaintiff's superior right. To be a *bona fide* holder one must take paper without notice, either actual or constructive, of any fraud, defect of title, or illegality of consideration in the transferrer's hands.

45. In *M. R. Burr*. 452, a bank note was stolen and came to the hands of the plaintiff, and he was HELD entitled to it. The Court of K. B. considered bank notes as cash, which passed as money in the way of business; and the holder, in that case, came by the note, for a full and valuable consideration, by giving money in exchange for it, *in the usual course of business*, and without notice of the robbery, and on those considerations he was entitled to the amount of the note.

46. In *3 G v. Burr*. 1516; 1 Black, Rep. 785, a bill of exchange, payable to bearer, was lost, and the finder paid it to a grocer, for teas, and took the change. The Court laid stress on the facts that the holder came by the bill *bona fide*, and in the course of trade, and for a full and *fair consideration*, and that though he and the real owner were equally innocent, yet he was to be preferred for the sake of commerce and confidence in negotiable paper.

47. In the 42d S. W. Rep. 1055, a certain note, which was one of a series of five and so mentioned on the face of the note, *was transferred before maturity* to one who knew that one of the notes of the series was past due and unpaid. It was held that the purchaser of the first mentioned certain note took it subject to the offset and defenses of the maker.

48. In *K v. H*, 52 Pa. St. 525, it was said that in certain respects, the contract of a guarantor is to be carefully distinguished from that of a surety, for while both are accessory contracts, and that of a surety is in some sense conditional, as that of a guarantor is strictly so, yet mere delay to sue the principal debtor does not discharge a surety. The surety must demand proceedings with notice that he will not continue bound unless they are instituted. *Cope v. Smith*, 8 S and R 110. By his contract he undertakes to pay if the debtor does not—the guarantor undertakes to pay if the debtor cannot. *The one is an insurer of the debt, the other an insurer of the solvency of the debtor*. It results, as a matter of course, out of the guarantor's contract, that the creditor shall use due diligence to make the debtor pay, and failing in this he discharges the guarantor.

49. In the case of *M v. L. C. B.*, 149 U. S. 298, the evidence showed that a promissory note was executed and delivered, then indorsed by the holder, and then guaranteed by six persons, and again indorsed by the holder. It was held that a guaranty of the payment of a negotiable promissory note

written by a person upon the note *before* its delivery requires no consideration to support it, and need express none other (even where the law requires the consideration of the guaranty to be expressed in writing) than the consideration which the note upon its face implies to have passed between the original parties. But a guaranty written upon a promissory note, *after* the note has been delivered and taken effect as a contract, requires a distinct consideration to support it, and if such guaranty does not express any consideration, it is void, where the Statute of Frauds of that State requires the consideration to be expressed in writing.

50. In *S v. S et al.*, 114 Ind. 453, the principal debtor tendered the full amount of a note at maturity. The creditor accepted \$240 in part payment and agreement with the debtor that he should retain the balance, paying interest thereon for one year. The sureties on the original note were sued for the balance. It was HELD that the contract made by the creditor and the principal, wherein the former, after accepting part payment of the debt, re-loaned the latter the remainder of the money due, released the sureties. Sureties, as is well known, have a right to stand upon the letter of their contract, and if the creditor assumes to *change the contract* he *releases them from liability*. A creditor who does any act inconsistent with the terms of the contract, or prejudicial to the interests of the sureties, releases them. He impliedly contracts to accept the money when due, and by his refusal to do so, he loses his claim upon the sureties, for his act is injurious to them.

SALE OF PERSONAL PROPERTY

51. In *G v. N*, 25 Mo. 29, sale by sample of five hogsheads of sugar by plaintiffs to defendants. Defendants asked to have the sugar weighed, which was done, and weigher's certificate together with a bill for the price sent to defendant. HELD, a sufficient delivery; so that when defendant sent for the sugar and found one hogshead missing, it was his loss.

52. In *O & Co. v. F*, 38 W. Va. 31, defendant bought a harvesting machine called a "binder," upon the condition that if it did not work to his satisfaction he might return it. HELD, that his right to reject was absolute, and his reasons could not be investigated.

53. In *D Co. v. A B*, 123 Mass. 12, one sold goods to be paid for on delivery, either in cash or notes of the purchaser. They were shipped under a bill of lading by which they were to be delivered on the payment of the freight. Before they arrived, some of the purchaser's notes were protested, and an agent of the seller was sent to stop the goods in transit. They were attached by one of the purchaser's creditors before his arrival, and before the purchaser had paid the freight or come into possession of them. HELD, that the right of stoppage in transit had been reasonably exercised.

54. In *Snow v. Schomacker Mfg. Co.* 69 Ala. 111, a piano was sold to S. with a guaranty reading: "Every piano warranted for five years." Some iron plates cracked and suit was brought for the price and a counter-claim was entered for the breach of warranty. It was contended that the warranty was only that the pianos were such. The court HELD that the warranty meant that with reasonable care and use that the piano would not break or give way in five years. Even if the express warranty does not mean this, the implied warranty, when a manufacturer contracts and sells an article that is

reasonably fit for the purpose for which it is to be used, is binding, if the goods fall below the standard. In this case the buyer is entitled to damages, the measure thereof being the difference between the purchase price and the present price. All expenses incident to the repair of the piano are to be included.

BAILMENTS

55. In *H v. K*, 25 Mo. App. 574, an artificer in the absence of a custom, at common law, has a lien only on the chattel improved by his labor and in his possession, and not for a general balance for work done on other chattels. In *W v. H*, 13 Ala. 776, the bailee has power to sell them to pay expenses. In *T v. T*, 53 Ind. 93, he loses his lien when he parts with possession.

56. In *S v. S*, 3 N. Y. 588, a lodging-house keeper who rents the different floors of his house in apartments or rooms does not assume responsibility for goods of his lodgers in such rooms, as he does not take them into his custody.

57. In *H v. N*, 138 N. Y. S. 287, one who checked a hand bag at a railroad station and received a check, on the back of which in fine type was a promise that the depositor agreed not to hold the railroad liable for more than \$10, to which his attention was not called, can recover the real value of the hand bag.

CORPORATIONS

58. (a) In *S v. St. L. R. Co.*, 41 Fed. 736, T and A having for a small sum purchased a road bed, the construction of which cost only \$2,000, caused a railroad company to be organized, and, with others, became directors thereof, and while in this relation contracted with the directors to sell the road bed to the company for \$200,000 cash or bonds, and \$3,600,000 of the capital stock. The sale was formally ratified at a meeting of the directors, and entered on the records of the company; and afterwards the stockholders unanimously approved the purchase. At the time of the sale there were no stockholders, and the stock then issued was all that had been subscribed. The company had no property except its charter and the road bed, and the value of the notes and stock issued to T and A had no marketable value. HELD, that the sale was not fraudulent.

(b) In *G v. D*, 54 N. Y. 403, four persons owning land valued at \$30,000 agreed to organize a corporation, and to transfer the land to it, and commenced to solicit stock subscriptions to the proposed corporation which designated the property as being worth \$125,000. They caused fictitious subscriptions to the extent of half of the capital to be subscribed, which were never intended to be paid, and marked them as having been paid. HELD, that a person subscribing to the stock of the corporation was entitled to recover the amount of his subscription from such four persons, when they received the money and divided it among themselves.

59. In *Glenn v. Killanning Brewery Co.* 103 AR. 340 Penn., the stockholders authorized an increase of \$100,000 in the capital stock. The directors distributed this stock at par among the major holders and did not take the trouble to advertise the issue to the minor holders. Suit was brought to test the legality of the issue to the major holders of stock. It was HELD that the stockholders of a corporation have the right to take up an issue of new stock in proportion to their holdings. The Court said in conclusion: "No rule is

better established than that the directors of a corporation stand in the position of trustees for the entire body of stockholders, and while stock owned by the director is his individual property, to be dealt with as he sees fit, in the same manner and to the same extent as other stockholders, yet, when he acts in his official position, he is acting not merely as an individual but as a representative of others, and is prohibited from taking advantage of his position for his personal profit or reaping personal benefit to the detriment of the stockholders whom he represents. Whenever there is an intimation that a director has violated the duty thus imposed upon him by virtue of his office, or has failed to act fairly and honestly towards those whom he represents, the law ceases to look at the mere form of the device or means employed, and 'pierces through the surface and seizes upon the evils that lie within.'"

The same rule has been laid down by the Federal Courts.

INSURANCE

60. (a) In *M v. Ins. Co.*, 126 Mass. 158, an application for life insurance was made to an insurance company, which it found satisfactory; and it wrote a policy based on the application and sent the policy to its agent, who offered the policy to the person making the application for inspection. The *premium called for by the terms of the policy was not paid*, and the policy was not delivered. HELD, that an action could not be maintained against the company under any form of declaration.

(b) In *Ins. Co. v. D.*, 16 Ky. 398, when insured has given a note to the agent in his representative capacity for the first premium of life insurance, *the policy will be avoided* on failure to pay such note at maturity, under a provision providing for forfeiture in case of failure to pay notes given for premiums at maturity, notwithstanding a receipt has been delivered to insured acknowledging payment of the cash premium.

REAL PROPERTY

61. In *Skinner v. Wilder* 38 Vt. 115, S. planted apple trees six feet from his dividing line with W.'s property. In time the trees grew so that the branches projected over the land. The controversy arose when W. picked up and carried away the apples from the limbs projecting over his land. S. brought an action of trespass. The court HELD that while the owner owns the space above this land, he does not necessarily own what another wrongfully places there. The owner has a right of action for damages, or he may remove the roots and branches even with the dividing line, but this does not justify him in taking the apples. The title to the apples depends on the ownership of the tree on whose land it is situated.

62. In *Saunders v. Stultz*, 177 N. W. 516 (Iowa) the question was considered relative to a bid made at a sale of land by a receiver. The point in question was the termination of an agreement to finance the purchase and sale of some 790 acres of land. A disagreement arose and a receiver was regularly appointed and duly qualified. The receiver offered the land for sale. He accepted a bid of \$130.00 an acre and he entered into a formal written contract to sell and convey at this price. Before the receiver made his report of his actions to the court, a second party, namely the First and

Second Mortgage Co., made a bid of \$145.00 to the receiver with favorable terms of payment. After hearing the parties, the court refused to confirm the sale to the first party and accepted the second bid.

The case is on appeal to the Supreme Court. It was contended that:

1. The bidder, to whom the property has been knocked down at a judicial sale, has acquired legal rights, and that the rights acquired are to be protected as those of any purchaser.
2. A final and accepted bidder has acquired a right of purchase and that the court has not the right to set aside the sale and that the purchaser has the right to have his bid confirmed.

The Court HELD as follows: "Until confirmed by the court the sale confers no right. Until then it is a sale only in a popular and not in a judicial or legal sense. The accepted bidder acquires, by the acceptance of his bid, no independent right, as in the case of a purchaser at a sale under execution to have his purchase completed, but is merely a preferred proposer, until confirmation by the court of sale, as agreed to by its ministerial agent. In the exercise of this discretion a proper regard is had to the interest of the parties and the stability of judicial sales. By sanctioning a sale, the courts make it their own. There is a difference between such sales, and sales by private agreement. In case of sales before a master, the purchaser is not considered as entitled to the benefit of his contract till the master's report of the purchaser's bidding is absolutely confirmed."

63. In *Crolley v. Clark and Alsop* 20 Fla. 849, one William Alsop, a resident of New York, and Clark, owned certain land in Florida. Alsop died leaving a will signed by two witnesses devising his share of the land to his widow. The will complied with the law of New York, but the law of Florida relating to wills required three witnesses. The court HELD that a will, to affect real property in this State, must conform to the laws of this State as to form and manner of its execution; otherwise it is of no effect; hence, so far as land in this state is concerned Alsop died intestate.

GLOSSARY

(Principal authority, Anderson's Law Dictionary, published by T. H. Flood & Co., Chicago, Ill.)

- Abrogate.** To revoke or annul one written law by another.
- Abstract of Title.** A concise statement of the record evidence of one's title or interest in realty. Frequently spoken of as an "abstract."
- Acceptance.** A receiving—with approval, or conformably to the purpose—of a tender or offer; receiving with intention to retain.
- Acceptance Supra Protest.** The acceptance of a bill, after it has been dishonored, for the honor of the drawer or an indorser.
- Acceptor.** One who accepts a bill of exchange—usually the drawee.
- Accommodation Indorser.** One who, not a regular party to a paper, adds his name to its credit.
- Accommodation Paper.** A loan of the maker's credit (without restriction as to the manner of its use) by means of a bill of exchange or a promissory note, and by making, accepting, or indorsing the same, as the case may be.
- Accord and Satisfaction.** A satisfaction agreed upon between the party injuring and the party injured, and the payment of same.
- Act of God.** Such inevitable accident as cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning or tempest, floods or inundation.
- Action.** Doing a thing, the exercise of power, physical or legal; the thing itself as done; an act, as, legislative, judicial, executive action.
- Acquittal.** A judicial discharge; a verdict of not guilty.
- Adjudication.** Determination by judicial authority.
- Administrator.** One appointed by a competent court to settle the affairs of a decedent's estate.
- Admiralty.** A court exercising jurisdiction over controversies arising out of the navigation of public waters; also, the system of jurisprudence which pertains to such controversies.
- Adult.** A person twenty-one or more years of age; in the case of females, in some States, eighteen years of age.
- Adverse Possession.** A term applied to the holding of real estate adversely to another.
- Affidavit.** A voluntary oath, before a judge or an officer authorized to administer oaths, to evince the truth of certain facts; as, the facts upon which a motion is grounded.

Agency. The relation between two persons as principal and agent.

Agent. A person employed by another to act for him. Opposed, principal.

Agister. One who takes the cattle of another into his own ground to be fed for a consideration to be paid by the owner.

Alias. Otherwise; also used in the sense of "for."

Alien. A foreigner; one born in or belonging to another country, who has neither acquired citizenship nor is entitled to the privileges of a citizen.

Alien Enemy. One who owes allegiance to a state at war with the state in which he then lives.

Alienate. To transfer or convey title, property or other right to another.

Alimony. An allowance which a husband or former husband may be forced to pay his wife or former wife.

Aliunde. From another place, as outside evidence—evidence aliunde.

Allonge. A paper attached to a bill or note for such indorsements as the original paper itself will not hold.

Alteration. A change or substitution of one thing for another; as, the alteration of a way.

Ambiguity. Doubtfulness and uncertainty in regard to meaning.

Annuity. A yearly sum stipulated to be paid to another in fee or for life or years, and chargeable only on the person of the grantor.

Annulment. The act of making void.

Anomalous Indorsement. An irregular indorsement.

Answer. The defendant's reply to a cause of action or complaint set up by the plaintiff.

Ante. Before; hereinbefore.

Antedated. Dating back or at an earlier time than the date of making.

Appraise. To set a price upon by authority of law.

Appurtenance. A right connected with the enjoyment or use of another thing as principal; also, the thing itself out of which the right grows as an incident.

Arbitration. The hearing and determining of a cause between parties in controversy by a person or persons chosen or agreed to by the parties.

Articles of Co-partnership. The written agreement by which a partnership is formed.

Assent. Agreement; approval; compliance; consent; willingness declared. Opposed; dissent.

Assets. Property sufficient to answer a demand made by a creditor or a legatee upon an executor or administrator, or by a creditor upon an insolvent or a bankrupt.

Assign. To transfer or make over to another the right one has in any object.

Assignee. One to whom property is transferred; more particularly one to whom an insolvent or a bankrupt makes over his whole estate for the benefit of his creditors.

Assignment. A transfer of property to another for himself or creditors; also, the writing containing the evidence thereof.

Assignor. One who transfers property to another person.

Assumption of Risk. This is a common law rule that a servant assumes the ordinary risk of the occupation, and that in case of injury he cannot claim damages of the principal.

Assumpsit. He undertakes. A promise that one person undertakes to do some act or to pay another.

Attachment. The seizure of property by direction of court, as for the satisfaction of a judgment.

Attestation. Signing as a witness. To witness an instrument.

Attorney in Fact. One who serves another as agent in the doing of a particular thing; an agent for the transaction of an act specified in a sealed instrument called a "letter" or "power" of attorney.

Award. To allow by judicial determination; as, for a court to award a writ of habeas corpus or other process.

Bailee. One who receives a thing bailed.

Bailment. A delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee.

Bailor. One who delivers a thing to another in bailment.

Banknote. A promissory note, issued by a bank under authority of law, payable on demand to the bearer.

Bankruptcy. The status or condition of being a bankrupt; also, that branch of the law under which the assets of the estate of a bankrupt may be distributed among his creditors and the bankrupt discharged from the indebtedness.

Barter. A contract by which goods are exchanged for goods.

Beneficiary. One who is entitled to the benefit of a contract or of an estate held by another.

Bequeath. To give personal property by will.

Bequest. A gift of personalty by will; the clause in the instrument making the gift; the thing itself so given.

Bilateral. Designates a contract executory on both sides; as, a sale, opposed to unilateral.

Bill of Exchange. A written order directing a second party to pay to a third party a certain sum of money. Commonly known as a draft.

Bill of Lading. A document delivered by a carrier to one sending goods by him, acknowledging that they have been received by him for transportation to a certain place. It is both a receipt and a contract.

Bill of Sale. An agreement in writing by which one person sells to another his interests in personal property.

Blank Indorsement. Unrestricted; indorsee not named; as, an indorsement in blank.

Bona Fide. In good faith. Open and without fraud or deceit.

Bond. That which binds; any instrument in writing that legally binds a party to pay a sum of money or to do a certain thing. "Bond," "obligation," and "instrument in writing" are sometimes used interchangeably.

Boycotting. A combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request made of him or them. The purpose

is to constrain acquiescence or to force submission on the part of the individual who, by non-compliance with the demand, has rendered himself obnoxious to the immediate parties, and, perhaps, to their personal and fraternal associates.

Breach. Relating to the violation of a law, contract, or other obligation.

Cargo. Goods on board of a vessel.

Capital Stock. The sum upon which calls may be made upon the holders of the stock of a corporation, and upon which dividends are declared.

Caveat Emptor. "Let the buyer beware."

Caveat Venditor. "Let the seller take heed."

Certificate of Deposit. A special form of depositing money with a bank, a receipt being given that may be negotiated.

Certificate of Stock. A written receipt issued by the officers of a corporation in favor of a designated person, acknowledging his ownership of a certain number of shares of stock.

Certified Check. A check marked "good" by the banker.

Cestui Que Trust. One for whom a trust exists, or was created; the beneficiary under a trust.

Charter Party. A contract by which the owner lets his vessel to another for freight.

Chattel. Things personal include not only things movable, but something more; the whole of which is comprehended under the general name of "chattels," which Coke says is a French word signifying goods—from the technical Latin

"catalla," which meant, primarily, beasts of husbandry, and, secondarily, all movables in general. In Normandy, a chattel stood opposed to a fief or feud.

Chattel Real. Chattels real, says Coke, are such as concern, or savor of, the realty; as, terms for years of land, estates by a statute-merchant, statute-staple, or the like.

Chose. A thing recoverable by an action at law; a thing, personalty.

Civil Action. A suit in which there may be a recovery for a private right or compensation for deprivation thereof.

Civil Law. The law of citizens; the law which the people of a state ordain for their own government.

Code. A reduction and revision of the law and procedure of a political community, upon one or more general subjects, and the enactment of this new, systematized statement as one statute.

Codicil. A supplement to a will; it is for the purpose of adding to or subtracting from the provisions of the will.

Collateral Securities. A security side by side with, or in addition to, other security as the primary or principal obligation, or additional to the debtor's own engagement.

Commercial Paper. Negotiable, such as bills of exchange, promissory notes, bank checks, given in the due course of business.

Common Carrier. One who undertakes, for hire or reward, to transport from place to place the goods of such as choose to employ him.

Common Law. The law common to all the realm. A collection of maxims and customs of higher

antiquity than memory or history can reach.

Complaint. A formal charge that a person named has committed an offense, preferred before a magistrate or a tribunal authorized to inquire into the probable truth of the accusation.

Composition. In the law of copyright, the invention or combination of the parts of a work—literary, musical, or dramatic; as, in the case of a letter, discourse, or book; or of an opera; but not of a mere exhibition, spectacle, or scene.

Compromise. A settlement of differences by mutual concessions.

Condition Precedent. Such condition as must happen or be performed before an estate can vest or be enlarged.

Condition Subsequent. A condition upon the failure or non-performance of which an estate already vested may be defeated.

Consanguinity. The connection or relation of persons descended from the same stock or common ancestor; blood-relationship.

Consignee. The factor or agent to whom merchandise or other personal property is shipped.

Consignor. One who makes a consignment of personal property.

Contributory Negligence. This is where the injured party contributes to his own injury through carelessness.

Conversion. An unauthorized assumption and exercise of ownership over personal property belonging to another.

Conveyance. The act of transferring from one person to another; as by "lease and release."

Co-Owners. Joint owners.

Co-partnership. A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits and losses thereof between them.

Co-Proprietors. Joint proprietors.

Copyright. An exclusive right to the multiplication of the copies of a production.

Corporation. An artificial person; a group of persons united by law and having a continuous existence irrespective of that of its members, and powers and liabilities different from those of its members.

Costs. The expenses of an action recoverable from the losing party.

Counter-Claim. A cross-demand, existing in favor of a defendant. Includes recoupment and set-off.

Court of Equity. A court which proceeds wholly according to the principles of equity, q. v.

Court of Law. Any court which administers justice according to the principles and forms of the common law.

Covenant. A promise under seal; as, a covenant to pay rent.

Coverture. The status of a married woman considered as under the power of her husband.

Crime. An act committed or omitted in violation of a public law either forbidding or commanding it.

Curtsey. The life estate a husband enjoys to property of his deceased wife, provided children have been born able to inherit.

Custom. The fixed habits of a community that are and have been for a long time past generally recognized in it as the standards of what is just and right.

Damages. The compensation which the law will award for an injury done.

Days of Grace. Three additional days after maturity in which to pay a negotiable bill or note.

Deceit. Any device or false representation by which one man misleads another to his injury.

Declaration. The pleadings setting forth the claims of plaintiff in a suit.

Decree. The decision, judgment, or sentence of a court of equity, of admiralty, of probate, or of divorce jurisdiction.

De Facto. In fact; as, a government de facto.

Default. A failure to perform a required act in a lawsuit within a required time.

Defendant. One who is called upon in a court to make satisfaction for an injury done or complained of.

Del Credere. Of trust, credit. Applied to an agent or factor who guarantees that the persons to whom he sells will perform the contracts he makes with them.

Delivery. The placing of one person in legal possession of a thing by another.

Demand. The right to claim anything from another by contract, tort, or superior right of property; asking or seeking for what is due or claimed as due.

Demise. A lease for years; it creates an implied warranty of

title and a covenant for quiet enjoyment.

Deponent. One who, being under oath, testifies in writing.

Deposit. To give in charge to another person, to commit to custody and care of another; to leave with for safe-keeping; to deliver to for further action, for a special or a general purpose, explained or understood.

Descend. The passing of real property to the heir or heirs of one who dies without disposing of it by will.

Deviation. In marine insurance, a voluntary departure, without necessity or reasonable cause, from the usual course of the voyage.

Devise. Originally, to divide or distribute property; now, to give realty by will.

Disability. Incapacity for action under the law; incapacity to do a legal act.

Discount. A counting off; an allowance or deduction from a gross sum on any account.

Dishonor. To refuse or neglect to accept or to pay negotiable paper at its maturity; also, the failure itself.

Doctrine. The principle involved, applied, or propounded; as the doctrine of escheat, estoppel, relation.

Domicile. The place where a person lives or has his home; that is, where one has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.

Dower. The interest which the law gives a widow in the realty of her deceased husband.

Draft. A written order drawn by one person upon another; a bill of exchange.

Duress. In its more extended sense, that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness.

Earnest. A part of the price of goods or service paid to a vendor at the time of bargaining, in assurance of a serious purpose to complete the contract.

Easement. A service or convenience which one neighbor has in another's land by charter or prescription, without profit.

Embezzlement. Appropriation to one's own use of anything belonging to another, whether rightfully or wrongfully in the possession of the taker; theft.

Emblements. The vegetable chattels called emblements are the corn and other growth of the earth which are produced annually, not spontaneously, but by labor and industry.

Eminent Domain. The power to take private property for public uses is termed "the right of eminent domain."

Enact. To establish in the form of positive law, or by written law.

Equity. The point of contrast between the law of nations and the law of nature was "equity," a term which some derive from a Greek word denoting the principle of equal distribution; but that

origin is to be preferred which gives the term the sense of "leveling." The civil law of Rome recognized many arbitrary distinctions between classes of men and property. The neglect of these distinctions was that feature of the law of nature which is depicted in equity. It was first applied, without ethical meaning, to foreign litigants.

Escheat. In the United States, a reversion of property to the state in default of a person who can inherit it.

Escrow. An instrument delivered to a third person to hold till some condition is performed by the proposed grantee. A scroll or writing not to take effect as a "deed" till the condition is performed.

Estate. Interest in real or personal property. More specifically, an interest in or concerning land.

Estoppel. The stopping of a person by a rule of law from asserting a fact or claim.

Eviction. It is difficult to define this word with technical accuracy. Latterly, it has denoted what formerly it was not intended to express. In the language of pleading, a party evicted was said to be expelled, amoved, put out. The word, which is from evincere, to dispossess by a judicial course, formerly denoted expulsion by the assertion of a paramount title, and by process of law. It is now popularly applied to every class of expulsion or amotion.

Executed Contract. A completed contract.

Execution. Doing or performing a thing required, as a carrying out of a judicial order to satisfy a judgment by seizure and sale of defendant's property.

Executor. The one to whom another commits by will the execution of his last will and testament.

Executory Contract. A contract that is to be carried out in the future.

Export. To send merchandise from one country to another.

Extradition. Surrender, by one government to another, of a person who has fled to the territory of the former to escape arrest and punishment under the criminal laws of the latter.

Factor. An agent who is commissioned by a merchant or other person to sell goods for him and receive the proceeds.

Fee. In feudal law, an allotment of land in consideration of military service; land held of a superior, on condition of rendering him service, the ultimate title remaining in him. Also called a fief or feud.

Fee-Simple. An absolute inheritance, clear of any condition, limitation or restriction to particular heirs, but descendable to the heirs generally, whether male or female, lineal or collateral.

Fellow Servant Rule. This is the common law doctrine that where two servants of equal rank injure the one or the other, no claim for damages against the principal results.

Feud. A fief or fee.

Fief. See Fee.

Firm. An association for the purpose of prosecuting any lawful business, formed by contract between two or more persons.

Foreclosure. The act of selling at public sale a mortgaged property upon which the mortgage has ex-

pired and the debt secured by it has not been paid.

Forgery. At common law, the fraudulent making or alteration of a writing to the prejudice of another man's right.

Franchise. A royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject; it is now obtained by a grant from the state. In general, a right or privilege.

Fraud. Craft, cunning, deceit contrary to equity and good conscience.

Freight. Merchandise transported or to be transported; also, compensation for such service.

Fructus Naturales. Nature's growths; natural fruits; increase by the unassisted powers of nature; as, the fruits of uncultivated trees, the young of animals, and wood.

Garnishment. A process served on a third person (generally an employer) to withhold and not to pay money (salary or debt) due another but to answer plaintiff's suit.

Good Consideration. That of blood, of natural affection between near relatives.

Good-Will. The degree of favor enjoyed by a business concern as indicated by its public patronage.

Goods. Has a very extensive meaning. In penal statutes it is limited to movables which have intrinsic values, and does not include securities, which merely represent value. In wills, when there is nothing to restrain its operation, it includes all the personal estate.

Guarantor. One who makes a guaranty.

Guaranty. Solemn assurance, covenant, or stipulation that something

shall be or not be done; as, the guaranties in the Constitution and Amendments thereto.

Guardian. One to whom the law entrusts the care of the person or property of another.

Heir. At common law, the person upon whom the law casts the estate immediately on the death of the ancestor.

Idiot. One who has been without understanding or reasoning power from birth.

Inchoate. Commenced, but not completed; not fully in existence or operation; inceptive; incomplete; imperfect.

Incorporeal. Existing in contemplation of law and enjoyable as a right, as a right of way, or franchise.

Incumbrance. A burden or charge upon property.

Indemnity. A compensation for a loss sustained.

Indebitatus Assumpsit. In practice this is a form of action generally brought on an implied promise.

Indenture. A deed.

Indorse. To write upon the back of any instrument or paper.

Indorsee. One to whom any right is assigned or transferred by indorsement.

Indorser. The person who writes his name upon a negotiable instrument prior to transferring it by delivery.

Indorsement. The act by which a bill or note payable to order is transferred; the transfer of the legal title to any such instrument.

Indorsement in Blank. The form in which the indorser does not name the transferee.

Indorsement in Full. Contains the name of the transferee.

Indorsement Without Recourse. The words used are "without recourse"; without liability in case of non-acceptance or non-payment. They are written after the indorser's signature.

In Esse. In existence. From the Latin for "being."

Infant. A person under the age of 21 years.

Injunction. A remedial writ, formerly issued almost exclusively by a court of chancery, to restrain the commission of a threatened act, or the continuance of an act.

Insolvency. Laws passed by the individual states for the distribution, among creditors, of the property of persons who are unable to pay their debts in the ordinary course of business.

Insolvent. Not possessing the means with which to pay debts in full.

In Statu Quo. In the same state as before.

Insurable Interest. An interest that may be insured.

Insurance. An agreement by which one party undertakes to indemnify another for certain losses.

Insurer. The party who engages to indemnify a party against loss.

International Law. The law which regulates by reason and natural justice the conduct and mutual intercourse of independent states with one another.

Intestate. Dying without making a valid will.

Inter Vivos. Between the living.

In Transitu. In transit; e. g., in shipment.

- Invalid.** Having no binding force.
- Joint and Several.** Said of an obligation in which all the obligees are to be held either collectively or as individuals.
- Judgment.** The determination of the law as the result of proceedings instituted in a court of justice.
- Jurat.** From the Latin *juratum*, sworn; the emphatic word in the Latin form of the certificate to an affidavit or deposition that it was sworn to.
- Jurisdiction.** Governmental authority.
- L. S.** *Locus sigilli*, place of the seal.
- Landlord.** One of whom land is held subject to the rendering of payment of rent or service.
- Law.** A rule of action prescribed by authority.
- Legacy.** A bequest, gift, or of goods and chattels by testament.
- Lessee.** One to whom a lease is made.
- Letters of Administration.** The instrument by which a person is empowered to take charge of the property of an intestate (generally) to collect the credits and pay the debts of the estate.
- Letters Testamentary.** The instrument under which a person named as executor in a will formally takes charge of the estate, and proceeds to carry out the direction in the will.
- Levy.** Taking possession of chattels by an officer of the law.
- License.** Permission or authority; as, a license to run a hotel.
- Lien.** A tie that binds property to a debt or claim for its satisfaction.
- Liquidated Damages.** Damages which are fixed in amount by the nature or terms of a contract.
- Litigation.** A contest in a court of justice; a judicial proceeding.
- Lunatic.** One who has had understanding, but by disease, grief or other accident has lost the use of his reason, yet the law presumes that he may recover.
- Maker.** Specifically, one who executes a promissory note. But "law-maker" means a legislator; and "the law-maker," the individual, or body that enacts a law or laws.
- Mandamus.** We command. A writ served to compel a person to perform some official duty.
- Mandate.** A charge, command; a judicial command.
- Majority.** The civil condition of one who is of the full age of twenty-one years.
- Maturity.** In a will, may import maturity of mind and character, the combined result of age and education; also the date on which notes, drafts, etc., fall due.
- Minor.** A person not twenty-one years of age; an infant.
- Misrepresentation.** A statement of fact not true in some particular, and misleading another to his injury.
- Mistake.** Some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence.
- Mortgage.** A transfer of the title of property as security for a debt.
- Municipal Law.** The rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what

is wrong respecting the intercourse of the state with its members and of the members with one another; also, the laws of a locality.

Necessaries. Refers to things essential or proper for the support of a wife, infant, or ward, and to the maintenance of a vessel.

Negligence. Failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done.

Negotiable Paper. An evidence of debt transferable by indorsement or delivery; a commercial, business, or negotiable instrument.

Negotiate. To conduct business; to discuss the terms of a bargain; to endeavor to effect an agreement; to conclude a contract.

Nominal Damages. Those given for violation of a right where no actual loss has been sustained.

Nominal Partner. A person presented to the public as a partner who in reality is not a partner. He is, however, liable as an ordinary partner.

Non Compos Mentis. "Not of whole mind." Not sound in mind, memory, or understanding.

Notary Public. An officer who publicly attests deeds or writings to make them authentic in another country, principally in business relating to merchants.

Novation. This is the result of a new agreement whereby a new party is substituted for one of the old parties.

Oath. Calling God to witness the truth of what is said.

Obligation. A ligament or tie; something which binds one to do or not to do an act.

Ordinance. A rule or regulation adopted by a municipal corporation.

Outlawed. When an obligation by reason of the lapse of time has become barred by the statute of limitations so that no action can be enforced against it, it is said to be outlawed.

Ownership. The right by which a thing belongs to an individual, to the exclusion of all other persons.

Par. The state of the shares of any business or undertaking when they are neither at a discount or at a premium; that is, when they may be bought at the original price, \$100 for a \$100 share.

Paramount Title. The origin and source of another title, as, the title of a landlord in comparison with that of his tenant.

Parol Contract. An agreement entered into by spoken words; also, an obligation not under seal.

Partnership. A "partner" is a member of a partnership, and a "partnership" (often called a "co-partnership") is a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.

Payee. One to whom payment has been or is to be made.

Per Se. By itself; in itself considered. As, an act of negligence per se; fraud per se; a nuisance per se.

- Plaintiff.** Originally, one who makes plaint; one who brings a suit.
- Pleading.** A plea of any nature, as a charge filed in court by attorney for the plaintiff.
- Pledge.** A bailment of personal property as a security for some debt or engagement.
- Pledgee.** One who receives a pledge; a pawnee.
- Pledgor.** One who delivers a pledge; a pawnor.
- Policy.** The settled method by which the government and affairs of a nation are or may be administered; system of public or official administration, as designed to promote the external or internal prosperity of a state.
- Post-Date.** To date after the true time.
- Possession.** The physical control which belongs to an unqualified ownership.
- Precedent.** A judicial decision which serves as a rule for future determinations in similar cases.
- Premium.** At a price higher than the nominal value; as, when it is said that a share of stock is at a premium.
- Presumption.** Next to positive is circumstantial evidence, or the doctrine of presumptions. When a fact cannot itself be demonstrated, that which comes nearest to proof of it is proof of the circumstances necessarily, or usually, attending it; this proof creates a presumption, which is relied upon till the contrary is established.
- Principal.** A person who, although competent to do an act on his own account, employs another person to do it.
- Probate.** Formal, official or legal proof; as, the probate of a claim, a will.
- Promise.** A declaration, verbal or written, made by one person to another for a good or valuable consideration, by which he binds himself to do or to forbear from doing some act, and gives to the other a legal right to demand and enforce fulfillment.
- Promisor.** The one who makes a promise.
- Principle.** A fundamental truth; an elementary proposition; a settled rule of action or procedure.
- Proof.** "Evidence" and "proof" are often used indifferently, as synonymous; but the latter is applied by the most accurate logicians to the effect of evidence, and not to the medium by which truth is established.
- Protest.** The formal declaration drawn up and signed by a notary that he presented a bill of exchange for acceptance or payment and that it was refused.
- Proxy.** A person empowered to act for another; as, to vote a share or shares of the capital stock of a corporation; also the authority itself to represent the constituent.
- Pur Autre Vie.** For the life of another.
- Quantum Meruit.** Whatever he deserved.
- Quantum Valebat.** Whatever it was worth—work, labor, goods, etc.
- Quasi.** As if; like; corresponding to. Marks resemblance, yet supposes difference, between objects.
- Quit-claim.** To quit or abandon a claim or title to by deed.

Ratification. Acceptance or adoption of an act performed by another as agent or representative; in particular, confirmation of what has been done without original authority.

Real Property. Land, tenements and hereditaments.

Realty. Real estate, real property.

Recession. A yielding up; transfer.

Receiver. One who receives anything belonging to another or others during litigation, or for the protection of a firm's creditors.

Recording Acts. Statutes which regulate the official recording of conveyances, mortgages, bills of sale, hypothecations, assignments for the benefit of creditors, articles of agreement, and other sealed instruments; for the purpose of informing the public, creditors and purchasers, of transactions affecting the ownership of property and the pecuniary responsibility of individual persons.

Recoupment. The act of retaining a part of a sum due by legal right to reduce it because of a counter-claim.

Redemption. Purchasing a thing which the buyer formerly owned; repurchase.

Release. The act of writing by which some claim or interest is surrendered to another person.

Remainder. An estate so created as to take effect and be enjoyed after another estate is determined.

Remedy. A mode prescribed by law to enforce a duty or redress a wrong.

Rent. A compensation or return made periodically for the possession and use of property of any kind.

Replevin. An action pursued for the purpose of recovering possession of certain property, generally unlawfully taken.

Reply. The response to a plea or answer.

Residence. The legal definitions of the cognate terms "residence" and "domicile" vary with the circumstances of the case and the mental constitution of judges and authors. While "residence" generally imports personal presence, one may have a "domicile" in a place from which he is absent most of the time. "Residence" also implies more than a temporary sojourn.

Resident. Literally, one who sits, abides, inhabits, or dwells in a particular place.

Residuary Devisee. A devisee who takes real property not otherwise disposed of by a will.

Residuary Legatee. A legatee who takes personal property not otherwise disposed of by a will.

Revert. To return to the donor or to the former proprietor or his heirs.

Right of Survivorship. The right to succeed to the estate of a joint tenant to the exclusion of his heirs.

Sale. A transmutation of property from one man to another in consideration of some price or recompense in value.

Satisfaction. The settlement or extinguishment of a demand, debt or judgment. Also, the record entry to that effect.

Seal. An instrument for impressing wax made to adhere to a writing, in attestation of the genuineness of the writing or of the deliberation with which it is executed.

Seisin. The possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold.

Set-Off. In law, when the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other, sets up a demand of his own, to counterbalance that of the plaintiff, either in whole or in part.

Specialty. An instrument under seal.

Specific. Characterizing a species, a particular kind; particular; definite; limited; restricted. Opposed to general.

Status. Standing; state; condition; situation.

Statute. The written will of a legislature, expressed in the form necessary to constitute it part of the law; an act of legislation; an enactment; a written law.

Stock. The animals which are used with, supported by, or reared upon a farm or land; also, share interests in a corporation.

Stockholder. The owner of one or more shares of stock in a corporation; a shareholder. What he "holds" is strictly a certificate of ownership.

Stoppage in Transitu. The right which arises to an unpaid vendor to resume the possession, with which he has parted, of goods sold upon credit, before they come into the possession of a vendee who has become insolvent, bankrupt, or pecuniarily embarrassed.

Sub-Agent. The agent of an agent.

Sub-Contract. A contract under a previous contract.

Subpoena. A writ requiring a person to appear at a certain time and place, or in default, to pay a penalty or undergo punishment.

Subrogation. The substitution of a new for an old creditor; more generally, the act of putting, by transfer, a person in the place of another, or putting one thing in the place of another.

Subscribe. To sign one's own name beneath or at the end of an instrument; also, to write one's name as attesting witness.

Succession. The mode by which a right is transmitted to another person or set of persons.

Summons. A warning to appear in court at the return-day of the original writ.

Supra Protest. Over protest.

Surety. A person who engages to be answerable for the debt, default, or miscarriage of another. The engagement constitutes a contract of suretyship.

Tenant. In its largest sense, anyone who holds lands, whatever the nature or extent of his interest.

Tender. An offer of the exact amount due upon a debt in legal currency; also when either side traverses or denies the facts pleaded by his antagonist he is said to "tender an issue."

Testament. Written or oral instructions, properly "witnessed" and authenticated, according to the pleasure of the deceased, for the disposition of his effects.

Testator. Any person who makes a will; specifically a man, as distinguished from **Testatrix**, a woman, who has made a will.

Title. The means whereby the owner of land has the just possession of his property.

Tort. Improper, unlawful conduct; wrong; injury for which the law gives a remedy.

Trade-Mark. A mark by which one's wares are known in trade.

Transcript. A copy of an original record.

Trespass. In its largest sense, any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property.

Trover. Originally, an action of trespass upon the case for the recovery of damages against such person as had "found" another's goods and refused to deliver them on demand, but "converted" them to his own use.

Trustee. A person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the "cestui que" trust.

Ultra Vires. Beyond the power or powers; exceeding authority.

Underwriter. When marine insurance was the only insurance known, a person soliciting a contract exhibited in writing, in a resort for merchants or insurers, the particulars of his application, or sent the application to an insurance-broker. A person who was willing to take the risk wrote underneath the application the sum, his name, residence, etc. Hence "under-write" came to mean to accept proposed contracts for insurance, to carry on the business of insuring against loss by storm, shipwreck, fire, etc.

Unilateral. When one party makes no express agreement, but his obligation is left to implication of law, as a guaranty.

Usury. Originally, a premium or reward for the use of money; a

commodity or other thing; in law, interest in excess of the prescribed legal rate.

Vendor. The party by whom a sale is made.

Venire. A judicial writ or precept used in summoning persons to serve as jurors.

Venue. The place in which anything is alleged to have happened.

Verdict. The finding of a jury.

Void. As employed in contracts, laws, decisions, and text-books, these words void and voidable are often ambiguous. They have been more or less interchanged in speaking of agreements, assignments, conveyances, sales, leases, orders, judgments, and other acts, transactions and proceedings where incapacity, irregularity, or actual or imputed fraud is present. Void, primarily, means of no legal effect or binding force, while voidable means something that is binding or of no legal effect at the option of the person to be bound.

Voidable. See definition of "void."

Waiver. A voluntary relinquishment of some right.

Warranty. To give assurance of the existence of a fact; as, of the quality of goods sold, the validity of a title, the description and uses of insured property.

Waste. Deterioration; destruction.

Wharfinger. One who keeps a wharf for receiving goods for hire.

Will. An instrument making a disposition of property to take effect after death.

Witness. One who gives evidence in a cause before a court.

Writ. An instrument in writing, under seal, issued by the proper authority, commanding a person to do or not to do a thing.

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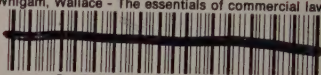
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